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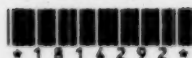
Agenda items 3, 4, 7, 9 and 10

**Promotion and protection of all human rights, civil,
political, economic, social and cultural rights,
including the right to development****Human rights situations that require the Council's attention****Human rights situation in Palestine and other
occupied Arab territories****Racism, racial discrimination, xenophobia and related
forms of intolerance, follow-up to and implementation
of the Durban Declaration and Programme of Action****Technical assistance and capacity-building****Communications report of Special Procedures*****Communications sent, 1 March to 31 May 2018;****Replies received, 1 May to 31 July 2018**

Joint report by the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context; the Working Group of Experts on people of African descent; the Independent Expert on the enjoyment of human rights of persons with albinism; the Working Group on Arbitrary Detention; the Special Rapporteur on the situation of human rights in Belarus; the Working Group on the issue of human rights and transnational corporations and other business enterprises; the Special Rapporteur on the situation of human rights in Cambodia; the Independent Expert on the situation of human rights in Central African Republic; the Special Rapporteur in the field of cultural rights; the Special Rapporteur on right to development; the Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea; the Special Rapporteur on the rights of persons with disabilities; the Working Group on Enforced or Involuntary Disappearances; the Special Rapporteur on the right to education; the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment;

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the Special Rapporteur on the situation of human rights in Eritrea; the Special Rapporteur on extrajudicial, summary or arbitrary executions; the Special Rapporteur on the right to food; the Independent expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of human rights, particularly economic, social and cultural rights; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Special Rapporteur on the situation of human rights defenders; the Special Rapporteur on the independence of judges and lawyers; the Special Rapporteur on the rights of indigenous peoples; the Special Rapporteur on the human rights of internally displaced persons; the Independent expert on the promotion of a democratic and equitable international order; the Independent Expert on human rights and international solidarity; the Special Rapporteur on the situation of human rights in the Islamic Republic of Iran; the Special Rapporteur on the elimination of discrimination against persons affected by leprosy and their family members; the Independent Expert on the situation of human rights in Mali; the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination; the Special Rapporteur on the human rights of migrants; the Special Rapporteur on minority issues; the Special Rapporteur on the situation of human rights in Myanmar; the Independent Expert on the enjoyment of all human rights by older persons; the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967; the Special Rapporteur on extreme poverty and human rights; the Special Rapporteur on the right to privacy; the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; the Special Rapporteur on freedom of religion or belief; the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material; the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity; the Special Rapporteur on contemporary forms of slavery; the Independent Expert on the situation of human rights in the Sudan; the Independent Expert on the situation of human rights in Somalia; the Special Rapporteur on the situation of human rights in the Syrian Arab Republic; the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; the Special Rapporteur on trafficking in persons, especially women and children; the Special Rapporteur on the promotion of truth, justice, reparation & guarantees of non-recurrence; the Special Rapporteur on the negative impact of the unilateral coercive measures on the enjoyment of human rights; the Special Rapporteur on violence against women, its causes and consequences; the Special Rapporteur on the human rights to safe drinking water and sanitation; and the Working Group on the issue of discrimination against women in law and in practice.

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Abbreviations

African Descent	Working Group of Experts on people of African descent
Albinism	Independent Expert on the enjoyment of human rights by persons with albinism
Arbitrary detention	Working Group on Arbitrary Detention
Belarus	Special Rapporteur on the situation of human rights in Belarus
Burundi	Special Rapporteur on the situation of human rights in Burundi
Business enterprises	Working Group on the issue of human rights and transnational corporations and other business enterprises
Cambodia	Special Rapporteur on the situation of human rights in Cambodia
Central Africa	Independent Expert on the situation of human rights in the Central African Republic
Côte d'Ivoire	Independent Expert on capacity-building and technical cooperation with Côte d'Ivoire in the field of human rights
Cultural Rights	Special Rapporteur in the field of cultural rights
Development	Special Rapporteur on the right to development
Disability	Special Rapporteur on the rights of persons with disabilities
Disappearances	Working Group on Enforced or Involuntary Disappearances
Discrimination against women	Working Group on the issue of discrimination against women in law and in practice
DPR Korea	Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea
Education	Special Rapporteur on the right to education
Environment	Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment
Eritrea	Special Rapporteur on the situation of human rights in Eritrea
Extreme poverty	Special Rapporteur on extreme poverty and human rights
Food	Special Rapporteur on the right to food
Foreign debt	Independent expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of human rights, particularly economic, social and cultural rights
Freedom of expression	Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression
Freedom of peaceful assembly and of association	Special Rapporteur on the rights to freedom of peaceful assembly and of association
Freedom of religion	Special Rapporteur on freedom of religion or belief
Haiti	Independent Expert on the situation of human rights in Haiti
Hazardous substances and wastes	Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes
Health	Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health
Human rights defenders	Special Rapporteur on the situation of human rights defenders
Housing	Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context

Independence of judges and lawyers	Special Rapporteur on the independence of judges and lawyers
Indigenous peoples	Special Rapporteur on the rights of indigenous peoples
Internally displaced persons	Special Rapporteur on the human rights of internally displaced persons
International order	Independent expert on the promotion of a democratic and equitable international order
International Solidarity	Independent Expert on Human Rights and International solidarity
Iran	Special Rapporteur on the situation of human rights in the Islamic Republic of Iran
Leprosy	Special Rapporteur on the elimination of discrimination against persons affected by leprosy and their family members
Mali	Independent Expert on the situation of human rights in Mali
Mercenaries	Working Group on the use of mercenaries
Migrants	Special Rapporteur on the human rights of migrants
Minority issues	Special Rapporteur on Minority Issues
Myanmar	Special Rapporteur on the situation of human rights in Myanmar
OPT	Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967
Older persons	Independent Expert on the enjoyment of all human rights by older persons
Privacy	Special Rapporteur on the right to privacy
Racism	Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance
Sale of children	Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material
Sexual orientation and gender identity	Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity
Slavery	Special Rapporteur on contemporary forms of slavery
Somalia	Independent Expert on the situation of human rights in Somalia
Sudan	Independent Expert on the situation of human rights in the Sudan
Summary executions	Special Rapporteur on extrajudicial, summary or arbitrary executions
Terrorism	Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism
Torture	Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment
Trafficking	Special Rapporteur on trafficking in persons, especially women and children
Truth justice, reparation & guarantees on non-recurrence	Special Rapporteur on the promotion of truth, justice, reparation & guarantees of non-recurrence
Unilateral coercive measures	Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights
Violence against women	Special Rapporteur on violence against women, its causes and consequences
Water and Sanitation	Special Rapporteur on the human right to safe drinking water and sanitation

Other abbreviations

AL	Letter of allegation
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JAL	Joint letter of allegation
JUA	Joint urgent appeal
UA	Urgent appeal
OL	Other letter

I. Introduction

1. Special procedures are mandated by the Human Rights Council to report to it on their activities (see Appendix).
2. In 2009, the sixteenth annual meeting of special procedures mandate holders decided that a joint communications report would be prepared (cf. A/HRC/12/47, paras 24-26), with this decision being reconfirmed by the seventeenth annual meeting of special procedures in 2010 in order to avoid duplication, rationalize documentation, allow examination of cross cutting issues and ensure that the content of communications and any follow-up would feed into the universal periodic review mechanism more effectively. Mandate holders decided that the report should contain summaries of communications and statistical information (A/HRC/15/44, para. 26-27).
3. The Outcome of the review of the work and functioning of the Human Rights Council calls on the Office of the High Commissioner for Human Rights to maintain information on special procedures in a comprehensive and easily accessible manner, and encourages the use of modern information technology to reduce the circulation of paper (A/HRC/RES/16/21, Annex, paras. 29 and 60).
4. All short summaries of allegations communicated to the respective State or other entity are made available on the Special Procedures communications website, link to which is included in paragraph 13 of the present report. The communications sent and responses received are also accessible electronically through hyperlinks. Communications are reproduced in the language in which they were sent. Replies received in Arabic, Chinese or Russian are included with translations into English, where available.
5. This website now reports all urgent appeals, and letters of allegations sent by special procedures mandate holders between 1 March and 31 May 2018 and replies received until 31 July 2018. Communications sent before 1 March 2018 are reported in A/HRC/38/54, A/HRC/37/80, A/HRC/36/25, A/HRC/35/44, A/HRC/34/75, A/HRC/33/32, A/HRC/33/32 corr.1, A/HRC/32/53, A/HRC/31/79, A/HRC/30/27, A/HRC/29/50, A/HRC/28/85, A/HRC/27/72, A/HRC/26/21, A/HRC/25/74, A/HRC/24/21, A/HRC/23/51, A/HRC/22/67, A/HRC/22/67 corr.1 and corr.2, A/HRC/21/49, A/HRC/20/30, A/HRC/19/44 and A/HRC/18/51 respectively and are also made available on the dedicated website.
6. As part of this report, the special procedures communications website also includes replies received between 1 May and 31 July April 2018 relating to communications sent by special procedures mandate holders before 1 March 2018. Some of these replies supplement information communicated earlier by the respective State.
7. The present report contains urgent appeals sent by the Working Group on Arbitrary Detention and the Working Group on Enforced or Involuntary Disappearances and joint urgent appeals sent by them together with other mandates. It does not contain other types of communications issued by these mandates, which are processed according to their own distinctive procedures, and are reported in the annual reports of these two working groups.
8. The names of some alleged victims have been obscured in order to protect their privacy and prevent further victimization. Names of victims who would otherwise have their identities protected are mentioned only when the individual concerned or their direct family has expressly consented or requested to have his or her name in the public report. In the original communications, the full names of the alleged victims were provided to the Government concerned. Names of alleged perpetrators have systematically been darkened in State replies to preserve the presumption of innocence.

9. In total 174 communications were sent during this reporting period to 78 countries and other non-State actors to which 66 replies were received from 39 countries and other actors as listed below:

<i>Name of countries</i>	<i>Number of communications sent</i>	<i>Replies received</i>
Afghanistan	1	0
Angola	1	0
Argentina	2	1
Armenia	1	1
Azerbaijan	1	1
Bahrain	1	1
Belarus	1	1
Brazil	3	1
Burundi	1	0
Cambodia	2	0
Cameroon	2	0
Canada	1	0
Chile	1	0
China	6	5
Colombia	1	1
Congo	1	0
Cuba	2	0
Ecuador	1	1
Egypt	4	0
El Salvador	1	0
Ethiopia	1	0
France	4	3
Gabon	1	1
Germany	1	1
Guatemala	6	2
Haiti	1	0
Honduras	2	1
Hungary	2	1
India	9	0
Indonesia	2	1
Iran (Islamic Republic of)	3	0
Iraq	2	1
Israel	3	0
Italy	1	1
Japan	2	2
Kenya	3	0
Kosovo	1	0

<i>Name of countries</i>	<i>Number of communications sent</i>	<i>Replies received</i>
Kuwait	1	1
Lebanon	3	1
Madagascar	1	0
Malawi	1	0
Malaysia	1	1
Maldives	1	1
Mauritania	1	0
Mexico	4	0
Montenegro	1	0
Mozambique	1	0
Myanmar	1	0
Nicaragua	2	0
Norway	1	1
Oman	1	0
Other actors	26	13
Pakistan	1	0
Peru	1	0
Philippines	2	1
Poland	1	1
Republic of Korea	2	1
Russian Federation	7	5
Rwanda	1	0
Saudi Arabia	2	2
Slovakia	1	1
Spain	2	2
Sri Lanka	1	0
Sudan	2	1
Switzerland	2	1
Thailand	1	0
The former Yugoslav Republic of Macedonia	1	0
Tunisia	1	1
Turkey	2	0
Uganda	1	0
United Arab Emirates	2	1
United Kingdom of Great Britain and Northern Ireland	3	2
United Republic of Tanzania	1	0
United States of America	7	0
Viet Nam	3	1
Yemen	1	0

Zambia	1	0
Zimbabwe	1	1

10. During the period, 26 communications were also sent to 'Other actors', for e.g businesses, international bodies, agencies and non-State actors to which 13 replies was received.

11. These communications concerned 301 alleged identified victims of which 162 are male, 45 are female and 94 others.

12. In preparing the statistics included in this report, uniform reporting periods have been used, reflecting all communications sent between 1 March and 31 May 2018, and responses received in relation to these communications up to 31 July 2018.

II. Statistics on communications and replies by mandate

Mandate	Reporting period: 1 March to 31 May 2018			Reporting period: 1 June 2006 to 31 May 2018		
	Communications sent	replied to by 31 July 2018	response rate ^a	Communications sent	replied to by 31 July 2018	response rate ^a
African Descent	2	1	50%	33	21	64%
Albinism	2	0	0%	9	2	22%
Arbitrary Detention (+)	26	10	40%	1593	893	56%
Belarus*	1	1	100%	13	10	77%
Burundi **	0	0	0%	6	0	0%
Business	41	22	54%	171	101	59%
Cambodia	2	0	0%	39	9	23%
Central African Republic	0	0	0%	1	0	0%
Cultural rights	8	4	50%	110	76	69%
Democratic People's Republic of Korea	1	1	100%	12	4	33%
Disability	7	3	43%	60	40	67%
Disappearances (+)	12	2	17%	414	190	46%
Education	1	0	0%	93	61	66%
Environment	15	3	20%	104	56	54%
Eritrea	0	0	0%	6	3	50%
Executions	34	10	29%	1453	717	49%
Food	26	15	58%	259	113	44%
Foreign debt	3	2	67%	25	16	64%
Freedom of opinion and expression	85	30	35%	3116	1658	53%
Freedom of peaceful assembly and of association	23	7	30%	1178	682	58%
Haiti **	0	0	0%	13	3	23%
Hazardous substances***	39	19	49%	131	78	60%
Health	37	17	46%	707	422	60%
Housing	6	3	50%	338	172	51%
Human rights defenders	67	22	33%	3332	1873	56%
Independence of judges and lawyers	15	4	27%	1209	664	55%
Indigenous peoples	3	0	0%	445	261	59%
Internally displaced persons	3	0	0%	38	18	47%
International order	0	0	0%	33	26	79%
International solidarity	1	0	0%	15	13	87%
Islamic Republic of Iran	0	0	0%	173	97	56%
Liberia **	0	0	0%	2	0	0%
Mercenaries	1	1	100%	74	29	39%
Migrants	15	4	27%	301	194	65%
Minority issues	6	0	0%	296	168	57%
Myanmar	1	0	0%	118	61	52%
Older persons	3	1	33%	5	3	60%
Palestinian territories occupied since 1967	3	0	0%	53	12	23%
Poverty	5	2	40%	96	66	69%
Privacy	6	3	50%	32	26	81%
Racism	7	2	29%	157	96	61%
Religion or belief	7	1	14%	497	293	59%

Mandate	Reporting period: 1 March to 31 May 2018			Reporting period: 1 June 2006 to 31 May 2018		
	Communications sent	replied to by 31 July 2018	response rate ^(*)	Communications sent	replied to by 31 July 2018	response rate ^(*)
Sale of children	1	0	0%	68	28	41%
Sexual orientation and gender identity	3	3	100%	18	12	67%
Slavery	26	15	58%	84	48	57%
Sexual abuse	0	0	0%	20	6	30%
Stalking	2	1	50%	45	11	24%
Terrorism	6	2	33%	316	155	49%
Torture	20	9	45%	2307	1277	55%
Trafficking in persons	7	1	14%	88	49	56%
Truth, justice, reparation and guarantees of non-recurrence	3	1	33%	62	35	57%
Unilateral coercive measures	0	0	0%	4	4	100%
Violence against women	15	6	40%	596	326	55%
Water, food, sanitation	11	4	36%	108	67	62%
Women in law and in practice	14	4	29%	267	126	47%

(*) mandate re-established in June 2012, (**) mandate terminated, (***) mandate name changed from 'toxic waste'

(+) These figures do not include communications on standard cases sent to Governments by the Working Group on arbitrary detention and the Working Group on enforced or involuntary disappearances.

(4) fractions in percentage are rounded to the nearest whole number.

Please note: Totals are higher than the actual number of communications sent or replies received in the given period, as many communications are sent jointly by two or more mandate holders.

III. Communications sent and replies received

Communications sent between 1 March and 31 May 2018 and their replies received until 31 July 2018. Also all replies received during this period to communications sent before 1 March 2018

13. All communications and their replies are available through Special Procedures communications website at the link:

<https://spcommreports.ohchr.org>

Appendix

Mandates of special procedures (until 30 June 2018)

<i>Mandate title</i>	<i>Human Rights Council resolution</i>
Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context	34/9
Working Group of Experts on people of African descent	36/23
Independent Expert on the enjoyment of human rights of persons with albinism	37/5
Working Group on Arbitrary Detention	33/30
Special Rapporteur on the situation of human rights in Belarus	35/27
Special Rapporteur on the situation of human rights in Cambodia	30/23
Independent Expert on the situation of human rights in Central African Republic	33/27
Independent Expert on capacity-building and technical cooperation with Côte d'Ivoire (Mandate formally closed by HRC President Statement PRST 35/1)	26/32
Special Rapporteur in the field of cultural rights	37/12
Independent expert on the promotion of a democratic and equitable international order	36/4
Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea	34/24
Special Rapporteur on the rights of persons with disabilities	35/6
Special Rapporteur on right to development	33/14
Special Rapporteur on the situation of human rights in Eritrea	35/35
Working Group on Enforced or Involuntary Disappearances	36/6
Independent expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of human rights, particularly economic, social and cultural rights	34/3
Special Rapporteur on the right to education	35/2
Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment	37/8
Special Rapporteur on extreme poverty and human rights	35/19
Special Rapporteur on the right to food	32/8
Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression	34/18
Special Rapporteur on the rights to freedom of peaceful assembly and of association	32/32

<i>Mandate title</i>	<i>Human Rights Council resolution</i>
Special Rapporteur on freedom of religion or belief	31/16
Independent Expert on the situation of human rights in Haiti (Mandate formally closed by HRC President Statement : PRST 34/1)	PRST 25/1
Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health	33/9
Special Rapporteur on the situation of human rights defenders	34/5
Special Rapporteur on the independence of judges and lawyers	35/11
Special Rapporteur on the rights of indigenous peoples	33/12
Special Rapporteur on the human rights of internally displaced persons	32/11
Special Rapporteur on the situation of human rights in the Islamic Republic of Iran	34/23
Special Rapporteur on the elimination of discrimination against persons affected by leprosy and their family members	35/9
Independent Expert on the situation of human rights in Mali	34/39
Working Group on the use of mercenaries	33/4
Special Rapporteur on the human rights of migrants	34/21
Special Rapporteur on minority issues	34/6
Special Rapporteur on the situation of human rights in Myanmar	34/22
Independent Expert on the enjoyment of all human rights by older persons	33/5
Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967	5/1
Special Rapporteur on the right to privacy	37/2
Special Rapporteur on the promotion of truth, justice, reparation & guarantees of non-recurrence	36/7
Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance	34/35
Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material	34/16
Special Rapporteur on contemporary forms of slavery	33/1
Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity	32/2
Independent Expert on human rights and international solidarity	35/3
Independent Expert on the situation of human rights in the Sudan	33/26
Independent Expert on the situation of human rights in Somalia	33/17

<i>Mandate title</i>	<i>Human Rights Council resolution</i>
Special Rapporteur on extrajudicial, summary or arbitrary executions	35/15
Special Rapporteur on the situation of human rights in the Syrian Arab Republic	S-18/1
Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism	31/3
Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment	34/19
Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes	36/15
Special Rapporteur on trafficking in persons, especially women and children	35/5
Working Group on the issue of human rights and transnational corporations and other business enterprises	35/7
Special Rapporteur on the negative impact of the unilateral coercive measures on the enjoyment of human rights	36/10
Special Rapporteur on violence against women, its causes and consequences	32/19
Working Group on the issue of discrimination against women in law and in practice	32/4
Special Rapporteur on the human rights to safe drinking water and sanitation	33/10



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Agenda items 2 and 3

**Annual report of the United Nations High Commissioner
for Human Rights and reports of the Office of the
High Commissioner and the Secretary-General**

**Promotion and protection of all human rights, civil,
political, economic, social and cultural rights,
including the right to development**

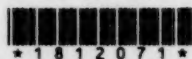
Draft guidelines for States on the effective implementation of the right to participate in public affairs

Report of the Office of the United Nations High Commissioner for Human Rights

Summary

The present draft guidelines, submitted to the Human Rights Council pursuant to its resolution 33/22, provide a set of orientations for States on the effective implementation of the right to participate in public affairs. The draft guidelines refer to a number of basic principles that should guide the effective implementation of the right to participate in public affairs. Various dimensions of that right are covered, with a focus on participation in electoral processes, in non-electoral contexts and at the international level, and recommendations have been formulated.

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I. Introduction

1. Participation enables the advancement of all human rights. It plays a crucial role in the promotion of democracy, the rule of law, social inclusion and economic development. It is essential for reducing inequalities and social conflict. It is also important for empowering individuals and groups, and is one of the core elements of human rights-based approaches aimed at eliminating marginalization and discrimination.
2. While the responsibility and accountability for taking decisions ultimately rests with public authorities, the participation of various sectors of society allows the authorities to deepen their understanding of specific issues; helps to identify gaps, as well as available policy and legislative options and their impact on specific individuals and groups; and balances conflicting interests. As a consequence, decision-making is more informed and sustainable, and public institutions are more effective, accountable and transparent. This in turn enhances the legitimacy of States' decisions and their ownership by all members of society.
3. The Human Rights Council has dedicated increasing attention to the issue of equal participation in political and public affairs.¹ In its resolution 33/22 on equal participation in political and public affairs, the Council requested the Office of the United Nations High Commissioner for Human Rights (OHCHR) to prepare concise and action-oriented draft guidelines as a set of orientations for States on the effective implementation of the right to participate in public affairs, as set out in article 25 of the International Covenant on Civil and Political Rights and as further elaborated on in other relevant provisions under international human rights law, and to present the draft guidelines to the Council at its thirty-ninth session. The Council also requested OHCHR to facilitate open, transparent and inclusive elaboration of the draft guidelines, including through informal consultations with States and other stakeholders at the regional level.
4. Consequently, OHCHR organized five informal regional consultations and issued two calls for submissions that generated responses from 65 stakeholders.² The process enabled the development of the present draft guidelines, which are grounded in the inputs received during the consultation process and informed by the examples of best practices gathered in that context.
5. Article 25 of the International Covenant on Civil and Political Rights recognizes the right to participate in public affairs, including the following three elements: (a) the right to take part in the conduct of public affairs; (b) the right to vote and to be elected; and (c) the right to have access to public service.
6. The draft guidelines start with references to a number of basic principles and elements that, in accordance with international human rights law, should guide the effective implementation of the right to participate in public affairs. The next focus is on the right to vote and to be elected, the right to take part in the conduct of public affairs and participation at the supranational level, including within international organizations.
7. In the light of the broad scope of the draft guidelines and due to the word limit, the draft guidelines are neither comprehensive nor able to address all aspects of the right to participate, such as the right to have access on general terms of equality to public service positions; similarly, the references to situations pertaining to the participation of specific individuals and groups that may face discrimination are not exhaustive. States are encouraged to develop further guidance at the national level in relation to the participation of individuals and groups that are marginalized or discriminated against, with a systematic integration of a gender perspective.

¹ See Council resolutions 24/8, 27/24 and 30/9. See also A/HRC/27/29, A/HRC/30/26 and A/HRC/33/25.

² Information on the consultation process and the submissions received are available at www.ohchr.org/participationguidelines.

8. It should be stated at the outset that meaningful participation requires a long-term commitment by public authorities, together with their genuine political will, an emphasis on agency and a shift in mindset regarding the way of doing things. To assist States in making this shift, the draft guidelines provide "a set of orientations" for how States should effectively implement the right to participate in public affairs, as requested by the Human Rights Council in its resolution 33/22. In the draft guidelines, it is recognized that civil society actors, including the media, can contribute to States' efforts to implement the recommendations contained herein.

9. The present draft guidelines refer, when appropriate, to "rights holders". This term seems more apt than others to include forms of participation, encompassing initiatives that involve all individuals affected or concerned by the decisions at stake.

10. In the draft guidelines, it is stressed that information and communications technologies (ICTs) offer new tools for participation, expanding the space for civic engagement, and have the potential to promote more responsible and accountable governments. ICTs are complementary to traditional forms of participation as they create additional opportunities for equal and meaningful participation. The draft guidelines also recognize that, nevertheless, ICTs could negatively affect participation, for example when disinformation and propaganda are spread through ICTs to mislead a population or to interfere with the right to seek and receive, and to impart, information and ideas of all kinds, regardless of frontiers.

11. The draft guidelines may contribute to the effective implementation of the Sustainable Development Goals in all regions. In fact, the 2030 Agenda for Sustainable Development places particular emphasis on the promotion and protection of participation of all members of society in public affairs, in particular with its goal 16, which includes targets to ensure responsive, inclusive, participatory and representative decision-making at all levels (target 16.7) and to ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements (target 16.10). Beyond Goal 16, the implementation and monitoring of the 2030 Agenda as a whole rests on the meaningful participation of all actors in society, in particular those most at risk of discrimination and of being left behind.

12. States are encouraged to translate the draft guidelines into local languages, to disseminate them widely, including to local authorities, and to make them available in accessible formats. The recommendations contained in the present draft guidelines should be turned into context-appropriate measures that comply with international human rights norms and standards.

13. Nothing in the draft guidelines should be interpreted as affording a lesser degree of protection to the right to participate in public affairs and other human rights than that provided under existing national laws and regulations and applicable international and regional human rights norms and standards.

II. Basic principles underpinning the effective implementation of the right to participate in public affairs

14. The right to participate in public affairs cannot be considered in a vacuum. The effective exercise of this right requires an environment where all human rights, in particular the rights to equality and non-discrimination, to freedom of opinion and expression and to freedom of peaceful assembly and of association, are fully respected and enjoyed by all individuals.

15. The right to participate in public affairs is closely linked to the full realization of the right of access to information, which, as part of the right to freedom of expression, is an enabler of participation and a prerequisite that ensures the openness and transparency of, and accountability for, States' decisions.

16. The right to participate in public affairs requires that the life, physical integrity, liberty, security and privacy of all members of society, including journalists and human rights defenders, be protected at all times.

17. Moreover, the right to participate requires an environment that values and takes into account the work and contribution of all members of society, supports and encourages their engagement and ensures that they are empowered and equipped with the knowledge and capacity necessary to claim and exercise their rights.

18. The following recommendations set out basic principles and related requirements that are among the minimum essential conditions for the effective exercise of the right to participate in public affairs.

Practical recommendations

19. States should create and maintain a safe and enabling environment that is conducive to the exercise of the right to participate in public affairs.

(a) States should create the legal framework for giving effect to the right to participate in public affairs by taking the steps necessary to accede to or ratify relevant international and regional human rights treaties, and accept related individual communications procedures. States should ensure that those treaties are adequately incorporated in national laws, policies and practices;

(b) The equal right to participate in public affairs should be recognized, protected and implemented in national constitutions and legal frameworks;

(c) Laws, policies and institutional arrangements should ensure the equal participation of individuals and groups in the design, implementation and evaluation of any law, regulation, policy, programme or strategy affecting them. Effective remedies should be available if this right is violated;³

(d) States should ensure that relevant rights, in particular the right to freedom of opinion and expression, including the right of access to information, and the rights to freedom of peaceful assembly and of association are protected and implemented in national legal frameworks. Effective remedies should be available if those rights are violated;

(e) The legitimate and vital role of civil society actors regarding participation in public affairs should be recognized. The independence and pluralism of such actors should be respected, protected and supported, and States should not impose undue restrictions on their ability to access funding from domestic, foreign or international sources;

(f) States should encourage and create the conditions for an independent and diverse media. They should enact legislation that promotes and protects the freedom of the media, encourages pluralistic media services and ensures the safety of journalists and other media workers, both offline and online;

(g) States should protect civil society actors, including human rights defenders and journalists, in particular women human rights defenders and women journalists, from all threats, attacks, reprisals and acts of intimidation, including against them or their family members, associates and legal representatives, whether offline or online. Such acts should be promptly, thoroughly and impartially investigated, perpetrators brought to justice, and effective remedies provided. In this context, States should exercise due diligence in preventing abuse committed by non-State actors;

(h) The right to participate in public affairs should be recognized as a continuum that requires open and honest interaction between public authorities and all members of society, including those most at risk of being marginalized or discriminated against, and should be facilitated continuously. In this context, collaboration with civil society actors for the identification and articulation of gaps, needs and solutions is crucial. Measures should be taken to build mutual respect, understanding and trust between public authorities and civil society actors.

³ See para. 21 below.

20. States should recognize, protect and implement the rights to equality and non-discrimination, and ensure inclusiveness in the exercise of the right to participate in public affairs.

(a) States should protect the rights to equality and non-discrimination and prohibit all forms of discrimination in their national constitution and legal frameworks;

(b) States should adopt and implement laws, policies and programmes that combat discrimination, including multiple and intersecting forms of discrimination, in public and private life, online and offline;

(c) The adverse impact of discrimination, including multiple and intersecting forms of discrimination, on the effective exercise of the right to participate in public affairs should be recognized, in particular for women and girls, young people, persons with disabilities, indigenous peoples, older persons, persons belonging to minority groups, persons with albinism, lesbian, gay, bisexual, transgender and intersex persons and other groups that are discriminated against;

(d) Adequate representation of the diversity within societies should be reflected, as appropriate, in State institutions and governmental bodies;

(e) The necessary legislative and policy measures, including temporary special measures, and institutional arrangements should be identified and adopted to promote and ensure equal participation of individuals and groups that are marginalized or discriminated against, at all levels of decision-making processes and institutions. Such measures should be continuously re-examined and evaluated to ensure equal participation and adequate representation of such groups in practice. Particular attention should be given to gender balance in public institutions;

(f) When designing and implementing measures to strengthen equal participation, it should be taken into consideration that groups that are marginalized or discriminated against may be highly heterogeneous and, within them, individuals do not all necessarily have the same needs or face the same challenges;

(g) States should consult with indigenous peoples, and respect and give effect in practice to their right to free, prior and informed consent, when adopting or implementing measures that may affect them. Consent should be sought through indigenous peoples' own representative institutions in accordance with their customary laws and practices, and through procedures determined by indigenous peoples themselves;

(h) The collection of disaggregated data and production of evidence-based research on participation in political and public affairs should be supported as an important element for the identification and development of adequate and effective measures to strengthen the participation of individuals and groups that are marginalized or discriminated against.

21. States should ensure equal and effective access to justice and effective remedies for violations of the right to participate in public affairs.

(a) All rights holders should have access to competent judicial, administrative or legislative authorities, or any other competent authority provided for by the legal system of the State, to have their right to remedy determined for violations of the right to participate in public affairs. All civil society actors, including civil society organizations, must be able to access justice. Gender-specific barriers preventing women and girls from accessing justice should be recognized and addressed;

(b) Procedures to access justice and other redress mechanisms should be fair, equitable, timely, gender-sensitive and affordable. The establishment of appropriate and effective assistance mechanisms, including legal aid, should be considered in order to remove or reduce financial and other barriers to access to review procedures, especially for individuals and groups that are marginalized or discriminated against, in particular women and girls;

(c) States should provide redress mechanisms for adequate, effective and prompt remedies, including gender-sensitive, victim-centred and transformative reparations, for violations of the right to participate in public affairs. States should ensure the timely and effective enforcement of decisions taken by courts of law or any other relevant independent and impartial bodies. Such decisions should be publicly accessible;

(d) Adequate and accessible information should be provided to rights holders regarding available processes and procedures for access to justice and redress mechanisms, including when the free, prior and informed consent of indigenous peoples has not been sought or obtained;

(e) Capacity-building and training programmes in international human rights law for members of the judiciary and other legal professionals, in particular regarding the right to participate in public affairs, should be promoted and facilitated on a regular basis. Such programmes should integrate a gender perspective;

(f) States should establish and support the functioning of national human rights institutions in line with the principles relating to the status of national institutions for the promotion and protection of human rights (the Paris Principles);

(g) National human rights institutions should have the mandate and resources to receive complaints and to monitor, report and act on violations of all aspects of the right to participate in public affairs, particularly of individuals and groups that are marginalized or discriminated against.

22. States should guarantee and give effect to the right of access to information.

(a) States should recognize, protect and implement the right of access to information in their national constitutions and legal frameworks;

(b) Laws and regulations on the right of access to information should comply with international human rights law, in particular by incorporating, at minimum, the following elements:

(i) Maximum, regular and proactive disclosure of all information of public interest held by public authorities, and a presumption in favour of access;

(ii) Any limitations should comply with international human rights law;

(iii) Procedures to request information of public interest should be free of charge or available at reasonable cost, allow for fair and rapid processing and include mechanisms for independent review in cases of refusal;

(iv) Protection for individuals who disclose information that they reasonably believe, at the time of disclosure, to be true and to constitute a threat or harm to a specified public interest (whistle-blowers) against legal, administrative or disciplinary sanctions;

(c) States should facilitate access to information, particularly for individuals and groups that are marginalized or discriminated against. This may include establishing procedures for the provision of assistance, from formulation of requests for information through to their delivery, for the purpose of promoting equal access to information;

(d) An independent and impartial oversight mechanism should be established and able to monitor and report on the implementation of the right of access to information. The reports of such mechanism should be public.

23. States should promote the principles of openness and transparency in all aspects of decision-making processes, and of accountability of public authorities for the implementation of the right to participate in public affairs.

(a) Openness, transparency and accountability should be ensured at all stages of decision-making by public authorities, from initial planning to budgeting, implementation, monitoring and evaluation;

(b) States should create effective mechanisms to ensure the accountability of non-State actors, including business enterprises, involved in the development and implementation of public policy and other public decisions;

(c) States should promote and commit to a culture of openness and transparency and consider, where applicable, joining the Open Government Partnership, an international network committed to making governments more open, accountable and responsive to the public.

24. States should empower rights holders to effectively exercise the right to participate in public affairs.

(a) Civic education programmes should be developed and implemented as an integral part of school curricula, in both public and private institutions. Such programmes should be aimed at empowering rights holders, promoting a culture of participation and building agency within local communities;

(b) Civic education programmes should include knowledge of human rights, the importance of participation for society, and an understanding of the electoral and political system and of various opportunities for participation, including available legislative, policy and institutional frameworks;

(c) Targeted capacity-building and civic education programmes should be provided for individuals and groups that are marginalized or discriminated against, and should take into account specific challenges, such as illiteracy and language and cultural barriers, in order to empower them to be active participants in public life. This includes the adoption of measures promoting the engagement and collaboration of all relevant civil society actors, including the media, and community and religious leaders, to bring about a shift in the norms and values restricting the exercise of the right to participate in public affairs, especially for women.

III. Dimensions of the right to participate in public affairs: forms and levels of participation

A. Participation in elections

25. Article 21 of the Universal Declaration of Human Rights highlights the role of periodic and genuine elections in ensuring that everyone is able to participate in the public affairs of his or her country. Article 25 (b) of the International Covenant on Civil and Political Rights provides citizens with the right and the opportunity to vote and to be elected at genuine periodic elections which are to be by universal and equal suffrage and are to be held by secret ballot, guaranteeing the free expression of the will of the electors. Elections lie at the heart of democracy, and remain the primary means through which individuals exercise their right to participate in public affairs.

26. In addition to allowing rights holders to take part in the conduct of public affairs as voters or candidates for election, thereby permitting participation through chosen representatives, certain electoral processes enable direct participation, as in the case of referendums. Genuine electoral processes are also essential to ensure accountability of representatives for the exercise of the legislative or executive powers.

27. International law does not impose any particular electoral system and there is no "one size fits all" model or solution to guarantee successful electoral processes. States enjoy a large margin of appreciation in this context. However, genuine elections should be held in an environment of general respect for and the enjoyment of human rights, on an ongoing basis, without discrimination and without arbitrary or unreasonable restrictions.

28. ICTs may provide tools to improve participation in elections and enhance their transparency. States considering the introduction of technological innovations in order to improve participation in electoral processes should do so only after broad outreach and consultations with all stakeholders, as well as comprehensive and consultative feasibility

studies, have been conducted. Digital innovations may be best introduced as a solution to problems that might hinder the credibility of the process or the acceptance of results, not as an end in itself.

29. The following recommendations should contribute to addressing the obstacles some individuals and groups, in particular women, facing discrimination or marginalization may encounter in the exercise of their right to vote and to stand for election and to ensuring more inclusive electoral processes.

Practical recommendations

30. States should develop an effective legal framework for the exercise of electoral rights, including with respect to the electoral system and electoral dispute mechanisms, in compliance with their international human rights obligations and through a non-discriminatory, transparent, gender-responsive and participatory process.

31. States should take proactive measures to strengthen the representation and equal participation of women, and groups that are discriminated against, in electoral processes. These include the following:

(a) Where such measures can be shown to be necessary and appropriate, States should introduce and effectively implement quota systems and reserved seats in elected bodies for women and underrepresented groups, after an in-depth assessment of the potential value of different kinds of temporary special measures, including of their possible impact in the particular local context and of potential, unintended side effects;

(b) When appropriate, States should adopt other temporary special measures to increase the participation of women, including: training programmes that build their capacity to be candidates; adjustments to campaign finance regulations that level the playing field for women candidates; financial incentives for political parties that achieve preset targets for gender-balance among their nominated or elected candidates; and parental health programmes supporting women's participation in public and private life;

(c) When binding quotas or reserved seats are introduced, effective and transparent mechanisms for monitoring compliance and the imposition of sanctions for non-compliance should be envisaged.

32. Any legal or policy measure to increase the representation of women and groups that are discriminated against should be accompanied by initiatives to challenge discriminatory attitudes and practices, including harmful gender stereotypes, and negative assumptions around the capacity of women, young people, minorities and persons with disabilities to contribute to public affairs.

33. Training for journalists and other media workers should be promoted in order to challenge gender stereotyping and misrepresentation of women in the media, and to sensitize the media and the electorate on the need and benefits of women in leadership positions.

34. Public-service broadcasting and media regulations should provide for equitable opportunity for all candidates to have access to significant airtime and space in the public media during electoral campaigns.

35. Within the confines of their electoral systems, States should ensure equal conditions for independent candidates to stand for elections and not impose unreasonable requirements on their candidacies.

36. States should remove unreasonable barriers to voter registration, including onerous or burdensome administrative requirements for accessing the necessary documentation to exercise the right to vote, particularly for women, minorities, indigenous peoples, those living in remote areas and internally displaced persons.

37. States should take measures to protect the safety of candidates, particularly women candidates, who are at risk of violence and intimidation, including gender-based violence, during the electoral process.
38. States should amend their national legal provisions that limit the right to vote on grounds of legal capacity and adopt the legal measures necessary to ensure that all persons with disabilities, especially those with intellectual or psychosocial disabilities, may exercise their right to vote.
39. States should take measures to ensure full accessibility for persons with disabilities in all aspects of the electoral process by, *inter alia*:
 - (a) Guaranteeing the free expression of the will of persons with disabilities as electors and to that end, for those who cannot exercise their right to vote independently, and at their request, allowing assistance in voting by a person of their own choice;
 - (b) Ensuring accessible voting procedures and facilities, and when full accessibility cannot be guaranteed, providing reasonable accommodation in order to ensure that persons with disabilities can effectively exercise their right to vote;
 - (c) Providing training for electoral officials on the rights of persons with disabilities in elections;
 - (d) Ensuring that electoral and voting materials are appropriate, accessible to the diversity of persons with disabilities and easy to understand and use.
40. States should consider aligning the minimum voting age and the minimum age of eligibility to stand for elections, to encourage the political participation of young people.
41. States should not exclude persons in pretrial detention from exercising the right to vote, as a corollary of the right to be presumed innocent until proven guilty according to law.
42. States should not impose automatic blanket bans on the right to vote for persons serving or having completed a custodial sentence, which do not take into account the nature and gravity of the criminal offence or the length of the sentence.
43. When appropriate, States should remove the practical obstacles that may hinder the exercise of the right to vote by persons serving a custodial sentence.
44. States should facilitate the independent scrutiny of voting and counting, including by providing access to places of voting, counting and tabulation of results.
45. Electoral management bodies should be able to function independently and impartially, irrespective of their composition. Such bodies should be open, transparent and maximally consultative in their decision-making and provide access to relevant information for all stakeholders.
46. States should ensure that their legal framework provides for the right of candidates to effectively challenge elections results and for remedies that are prompt, adequate and effective, and enforceable within the context of the electoral calendar.
47. States should consider, on the basis of appropriate national consultations and consultations with host States, and taking into consideration all relevant factors, allowing citizens who are abroad or temporarily out of the country to exercise their right to vote.
48. States should consider extending the right to vote to non-citizens after a period of lawful and habitual, long-term residence, at least for local elections.

B. Participation in non-electoral contexts

49. In its general comment No. 25 (1996), the Human Rights Committee states that the conduct of public affairs is a broad concept that covers all aspects of public administration,

and the formulation and implementation of policy at international, national, regional and local levels. In that same general comment, the Committee also recognizes the right to participate directly in the conduct of public affairs.

50. There are several ways in which the right of direct participation in the conduct of public affairs can be exercised. Direct participation may take place when, for example, rights holders choose or change their constitutions or decide public issues through a referendum.

51. In general comment No. 25, the Human Rights Committee recognizes that direct participation is engaged in by taking part in popular assemblies which have the power to make decisions about local issues or about the affairs of a particular community, and in bodies established in consultation with government. In addition, participation in the conduct of public affairs can be realized by exerting influence through public debate and dialogue with elected representatives or through the capacity of rights holders to organize themselves.

52. The consultation process conducted in preparation for the present draft guidelines revealed that a number of direct participation initiatives, which contribute to and complement participation through elected representatives, are being implemented around the world.

53. Participation in decision-making processes may happen at different levels, from provision of information, through consultation and dialogue, to partnership or co-drafting. These levels relate to the degree of involvement or the "intensity" of participation of rights holders in the different steps of the decision-making process (i.e., agenda setting, drafting, decision-making, implementation, monitoring and reformulation).

54. Modalities of participation, namely, the tools to facilitate participation, such as websites, campaigns, multi-stakeholder committees, public hearings, conferences, consultations and working groups, may vary in function of the level of participation and the step of the decision-making process. While participation should be secured at all stages of decision-making, no specific set of modalities can be recommended in all contexts.

55. The following recommendations provide States with some guidance on how to ensure that rights holders can participate and exercise a meaningful influence in decision-making that may affect them.

Practical recommendations

(a) Institutional framework to ensure participation in the decision-making of public authorities

56. Formal permanent structures should be developed to ensure that participation in decision-making processes is widely understood, accepted and routinely realized by both public authorities and rights holders. Such structures may include a coordinating body for participation in the Government, participation coordinators or facilitators in ministries, joint public-civil society councils, committees or working groups and other bodies, or framework agreements between public authorities and civil society actors to support participation.

57. Formal participation structures should be accessible to and inclusive of individuals and groups that are marginalized or discriminated against, including those from disadvantaged socioeconomic backgrounds, in particular women and girls. Specific permanent mechanisms for the participation of groups that have been historically excluded, or whose views and needs have been inadequately addressed in decision-making processes, such as indigenous peoples, minorities, and persons with disabilities, should be developed.

58. To ensure that these structures and mechanisms provide meaningful opportunities for participation, they should, at minimum:

- (a) Be co-designed with relevant rights-holders;

(b) Impartially channel the views of the rights holders concerned into actual decision-making processes;

(c) Be provided with an adequate budget and human resources with expertise on the different groups for which participation needs to be encouraged and enabled;

(d) Be accessible, inclusive, gender-responsive and representative.

59. When decision-making processes may have an impact on children, States should ensure that the right of children to express their views freely and to be heard is guaranteed, including by establishing child-friendly, age-appropriate, gender-sensitive, inclusive and safe mechanisms for their meaningful engagement.

60. In peace processes and post-conflict and humanitarian situations, States should consider establishing formal structures for the participation of those individuals and groups that are or have been most affected by the conflict, such as children, young people, minorities, persons with disabilities, internally displaced persons, refugees and women and girls, in the development, implementation and monitoring of all relevant legislation, policies, services and programmes. Any such structures should be designed to give effect to the right of those individuals to make a free and informed choice on sustainable solutions concerning them.

61. The institutional framework for participation should make it possible, at all times, to create and use new modalities of participation, including through the use of ICT.

62. The performance of participatory frameworks, including structures and procedures, should be regularly evaluated and assessed in order to adjust and improve them and build in innovative ways of and opportunities for participation, on the basis of the needs of affected rights holders.

(b) Measures to ensure meaningful participation at different stages of decision-making

63. The following recommendations provide guidance for the relevant public authorities of States on ensuring meaningful participation before, during and after decision-making.

Participation before decision-making

64. Rights holders should be given the opportunity to participate in shaping the agenda of decision-making processes in order to ensure that their priorities and needs are included in the identification of the subject matter and content for discussion. This can be done, for example, through online consultations, public hearings or forums, or working groups or committees composed of representatives of public authorities and members of the society. Where working groups or committees are established, the relevant public authorities should adopt transparent and inclusive criteria and processes for the representation of members of disadvantaged groups.

65. Elected representatives should play a critical role in supporting these processes, including through their participation and their representation of the constituencies to which they are accountable.

66. Rights holders who are directly or likely to be affected by, or who may have an interest in, a proposed project, plan, programme, law or policy should be identified and notified. Notification should be provided to all such rights holders in a timely, adequate and effective manner. In addition, the participation of any other rights holders wishing to participate should be facilitated. When decisions have countrywide or very widespread impact, for example during constitution-making and reform processes, everyone should be identified as potentially affected.

67. Information regarding the decision-making process should contain clear, realistic and practical goals in order to manage the expectations of those participating. Information about the process should include, as a minimum, the following elements:

(a) The type or nature of the decision under consideration. This includes clarity of the subject matter, information on the rationale behind the decisions to be made and the kind of decision(s) that should be taken at each stage of the process;

(b) The range of options to be discussed and decided at each stage, including problems, alternatives and/or solutions, and the possible impact of their outcomes;

(c) The timelines for participation at each stage of the process, which should be adjusted depending on the specific circumstances (e.g., according to the complexity of the issue at stake or the number of rights holders affected by the decision) and should provide sufficient opportunity for rights holders to properly prepare and submit constructive contributions;

(d) The identification of public officials and institutions involved and their capacity to deliver (i.e., their respective roles and various tasks at each stage of the process);

(e) The identification of the public authority responsible for making the decision;

(f) The procedures envisioned for the participation of rights holders, including information regarding:

(i) The date on which the procedure will begin and end;

(ii) The time and venue, including information on accessible infrastructure, of any envisaged participatory processes;

(iii) The modalities and rules of the conduct of the participatory process;

(iv) The public authority or official body to which comments or questions can be addressed or from which additional information on the decision under consideration can be requested, and the procedure and time frame for the transmittal of their response.

68. Rights holders should be able to access adequate, accessible and necessary information as soon as it is known, to allow them to prepare to participate effectively, in accordance with the principle of maximum disclosure.⁴

69. Relevant information should be proactively disseminated by making it available in a manner appropriate to local conditions and taking account of the special needs of individuals and groups that are marginalized or discriminated against.⁵ This should include:

(a) Providing information free of charge or at reasonable cost and without undue restrictions on its reproduction and use both offline and online;

(b) Providing both technical information for experts and non-technical summaries for the general public;

(c) Disseminating information in clear, usable, accessible, age-appropriate and culturally appropriate formats, and in local languages, including indigenous and minority languages. This may entail publications in Braille, easy-to-read and plain language formats;

(d) Disseminating the relevant information as widely as possible, including through the website of the relevant public authority or authorities if that method is effective. Other dissemination channels may include local print media, posters, billboards, mass media (television or radio) and other online sources;

(e) Considering adopting the method of individual notification where appropriate and with due regard to personal data protection.

⁴ See para. 22 above.

⁵ See para. 20 above.

Participation during decision-making

70. Rights holders should be able to participate in the decision-making process from an early stage, when all options are still open. This entails, for example, that public authorities refrain from taking any formal, irreversible decisions prior to the commencement of the process. It also requires that no steps be taken that would undermine public participation in practice, for example large investments in the direction of one option, or commitments to a certain outcome, including those agreed with another organ of the State, a non-State actor or another State.

71. Any revised, new or updated draft versions of documents relating to the decision(s) should be made public as soon as they are available.

72. Sufficient time for rights holders to prepare and make their contributions during decision-making processes should be provided. This entails, for example, ensuring that opportunities to participate do not exclusively, or in large part, fall during periods of public life traditionally considered as holidays, such as religious festivals, national holidays or major vacation periods in the State concerned.

73. Rights holders should be entitled to submit any information, analyses and opinions directly to the relevant public authority, either electronically or in paper form. Opportunities to provide comments should be easily accessible, free of charge and without excessive formalities.

74. The possibility to submit written comments through online tools should be combined with opportunities for in-person participation. To this purpose, States should consider establishing, for example, multi-stakeholder committees and/or advisory bodies and organizing expert seminars and/or panels and open plenary sessions to allow meaningful participation in all stages of public decision-making processes. Where such structures are established, transparent and inclusive criteria and processes for the representation of members of disadvantaged groups should be adopted.

75. Participatory events should be free of charge and held in venues that are neutral and easily accessible, including for persons with disabilities and older persons. States should also provide reasonable accommodation, as needed. Depending on local circumstances and the decision concerned, in-person participation may be supplemented with online tools, where relevant.

76. The weight given to contributions received through online platforms should be equal to that given to comments received offline.

77. The technical capacities and expertise of public officials responsible for the conduct of participatory processes should be strengthened, including in the areas of information collection, meeting facilitation, strategy formulation, action planning and reporting on outcomes of the decision-making process.

78. Appropriate data collection and management systems for collecting, analysing, deleting and archiving inputs received both online and offline should be developed, and transparency in how those systems are designed and used, and how data is processed and retained, should be ensured.

Participation after decision-making

79. The outcome of the participation process should be disseminated in a timely, comprehensive and transparent manner, through appropriate offline and online means. In addition, the following should be provided:

(a) Information regarding the grounds and reasons underlying the decisions;

(b) Feedback on how the contributions of rights holders have been taken into account or used, what was incorporated, what was left out and the reasons why. For example, a report can be published, together with the decision(s) made, which may include the nature and number of inputs received and provide evidence of how

participation was taken into account. This requires that adequate time be allocated between the end of the participatory process and the taking of the final decision.

(c) Information on available procedures to allow rights holders to take appropriate administrative and judicial actions with regard to access to review mechanisms.

80. Opportunities should be available for those who participated to assess the participatory process in order to document lessons learned for future improvement. To this end, relevant public authorities should consider conducting surveys or focus group discussions, including through the creation of dedicated websites, by phone or in person, in order to collect information on various aspects of participation at all stages of the decision-making process. States should ensure that the information collected in this context is representative of the diversity of all rights holders who participated.

81. In order to allow meaningful participation in assessing the decision-making process, States should provide information on the process, including the following:

- (a) The number, and format, of communications used to notify rights holders;
- (b) The resources allocated to the process;
- (c) The number of people who participated at the various stages of the decision-making process;
- (d) Disaggregated data on those participating, with due regard to personal data protection;
- (e) Participation modalities;
- (f) Accessibility and reasonable accommodation measures.

82. Participation in the implementation of decisions made should be ensured. Accessible and user-friendly information should proactively be disclosed at all implementation stages. This may be achieved, for example, through the creation of dedicated websites and/or email alerts and the organization of events, conferences, forums or seminars.

83. When appropriate, States should consider establishing strategic partnerships with civil society actors, while respecting their independence, to strengthen participation in the implementation of decisions made.

84. Participation and transparency in monitoring the implementation of decisions made should be ensured. Appropriate frameworks should be developed to evaluate States' performance in relation to the implementation of relevant laws, policies, projects or programmes. The frameworks should include objective, measurable and time-bound performance indicators, including on rights holders' participation in tracking implementation activities. Progress reports on implementation should be made public and disseminated widely, including through the use of ICTs and the organization of conferences, forums and seminars.

85. Rights holders should have access to key information to allow effective participation in monitoring and evaluating progress in the implementation of decisions. Information on the implementation process should include the following:

- (a) The identification of the authority in charge of the implementation process and its contacts;
- (b) The resources, financial and non-financial, to be used for implementation;
- (c) Whether the implementation involves a public-private partnership, and if such is the case, all information on the role and contacts of the private actor(s) involved;
- (d) Opportunities for participation in the implementation process.

86. Participation in monitoring and evaluation should be considered as a continuum and include the use of social accountability tools, such as social audits, public expenditure tracking surveys, community score cards, social audits, transparency portals, community media and public hearings.

Information and communications technology to strengthen equal and meaningful participation

87. ICT participation tools should be human rights compliant by design, and participation through the use of ICTs should follow the same principles of offline participation.⁶ This entails ensuring that the development and deployment of ICTs, including new data-driven technologies for participation, is guided and regulated by international human rights law, with particular regard to gender equality, in order to avoid any adverse human rights impact on individuals and groups that are marginalized or discriminated against, whether the impact is intentional or unintentional.

88. Effective measures to close the digital divides should be developed and implemented, especially for women, persons with disabilities, older persons, persons living in rural areas and indigenous peoples. In this context, proactive measures should be adopted to make ICT widely available, accessible and affordable, including in remote or rural areas, and without discrimination of any kind. This should include, for example, supporting the reduction and, as far as possible, the removal of social, financial and technological barriers restricting public access to the Internet, such as high connection costs and poor connectivity.

89. The involvement of different stakeholders, including civil society actors and business enterprises, in the design, development and use of ICTs for participation should be promoted. In this context, due regard should be given to the Guiding Principles on Business and Human Rights.

90. ICTs should be used to create spaces and opportunities for rights holders to participate meaningfully in a variety of activities that extend beyond communication and information-sharing. Technology should provide real opportunities to influence decision-making processes, for example with regard to submitting, and commenting and voting on, legislative and policy proposals. Where appropriate, States should consider providing additional, complementary offline opportunities for participation.

91. Existing ICT tools for participation should be translated into multiple local languages, including languages spoken by minorities and indigenous peoples, and should ensure their accessibility for persons with disabilities.

92. Media education and digital literacy programmes should be included in formal and non-formal curricula to allow meaningful participation online. For example, these programmes should focus, where relevant, on technical fundamentals of the Internet and develop critical thinking to help rights holders to identify and evaluate information and content from different sources.

93. Media and ICT education curricula should address issues related to hate speech, xenophobia, sexism and harmful gender stereotypes, racism and any other form of intolerance as factors that further exacerbate the marginalization and exclusion of some individuals and groups from public life. The role of civil society actors, including the media, in delivering positive counter-narratives online, including against hate speech, should be supported.

94. Comprehensive and forward-looking media and ICT literacy training programmes for public officials responsible for implementing participatory processes should be developed and delivered in order to take full advantage of the potential of ICTs.

⁶ See chap. II.

C. Right to participate in public affairs at the supranational level, including in international organizations

95. The Human Rights Committee, in its general comment No. 25, recognized that the right to take part in the conduct of public affairs also covers the formulation and implementation of policy at the international and regional levels. Despite the importance of participation at the international level, the workings of international organizations continue to be opaque for most people.⁷

96. Decision-making at the regional and international levels may have a significant effect on the realization of human rights, as such decision-making has an impact on national legislation, policies and practices. It is thus necessary that such decisions are made in a transparent and accountable manner, with the participation of those who will be affected by those decisions, and in an environment respectful of public freedoms, which are fundamental and should also be protected at the international level. Civil society actors choosing to participate in regional and international meetings must be safe and not be subject to acts of reprisal.

97. Those who participate at the supranational level often bring local and national concerns to the attention of the international community, thus connecting the international and local levels. For example, civil society actors have been instrumental in raising awareness at the regional and international levels of the rights of groups that are marginalized or discriminated against, and in empowering and giving voice to them. Such participation has also contributed to challenging social norms and the organizational culture of regional and international organizations.

98. The forms and modalities of the participation of rights holders at the international level might vary according to the format and rules of the international forum concerned, and the nature and phase of the process. Participation may be ensured through different means, including the granting of observer, consultative or participatory status; advisory committees open to relevant stakeholders; forums and dialogues; webcasting of events; and general calls for comments. For rights holders to participate effectively at the international level, access to information is indispensable.

Practical recommendations

99. States should respect, protect and facilitate the rights to freedom of expression and to freedom of peaceful assembly and of association in connection with the exercise of the right to participate at the international and regional levels.

100. Participation of civil society actors in meetings of international organizations, mechanisms and other forums, at all relevant stages of a decision-making process, should be allowed and proactively encouraged.

101. Access to international and regional forums should be provided without discrimination of any kind.

102. States should end all acts of intimidation and reprisals against civil society actors engaging or seeking to engage with international forums, and/or participating in any related event. When acts of intimidation or reprisals take place, States should investigate all allegations, provide effective remedies and adopt and implement preventive measures to prevent their recurrence. Understanding and addressing gender-specific forms of reprisal is key in this context.

103. States should establish objective, consistent and transparent criteria for expeditiously granting to civil society organizations observer, consultative or participatory status in international organizations. Organizations having their

⁷ In the context of the present draft guidelines, the terms "international organizations", "participation at the international level" and "international meetings and forums" should be understood as including the regional level.

requests rejected should be provided with the reasons and a means to appeal to a higher or different body.

104. States should refrain from unduly preventing civil society actors from obtaining accreditation with international organizations, arbitrarily withdrawing accreditation or regularly deferring examination of requests for accreditation.

105. Permanent structures for the continuous participation of civil society actors in international forums should be established, for example through the creation of civil society platforms. These structures should be created through impartial, non-discriminatory, transparent and participatory processes, and should be particularly accessible to and inclusive of individuals and groups facing discrimination.

106. The use of innovative, cost-efficient and practical approaches, including through the use of ICTs (e.g., webcasting, videoconferencing and other online tools), should be encouraged in order to foster greater and more diverse participation of civil society actors at the international level.

107. States should facilitate the timely issuance of visas for those wishing to participate in international forums.

108. Funds should be made available to facilitate meaningful and equal participation in international forums, particularly by women human rights defenders and small, community-based civil society organizations.

109. The capacity of rights holders to participate meaningfully in international forums should be strengthened, in particular among those who are less proficient in procedures governing participation at the international level, such as grass-roots and local civil society organizations working with individuals or groups that are marginalized or discriminated against.

110. States should encourage international forums to develop and make widely available a clear and transparent set of policies and procedures on participation in order to make access more consistent and reliable. Criteria for accreditation to meetings should be objective and broad, and registration procedures should be easy to understand and accessible.

111. Participation of rights holders in meetings in international forums should include access to relevant information, such as documents, drafts for comments and websites relevant to the decision-making process, the possibility to circulate written statements and to speak at meetings, without prejudice to the ability of international forums to prioritize their business and apply their rules of procedure. Any criteria for assessing the appropriateness of materials must be made public and any objection process should be transparent and allow sufficient time for the affected civil society organization to respond.

112. States should request international forums to proactively make available information related to decision-making processes, through the use of ICTs or other appropriate means, in a timely manner and in all official languages of the international organization or forum concerned. Access-to-information policies for international organizations should be adopted through resolutions and other governance mechanisms and be in line with international human rights law.

113. The designation of information officers or contact persons in international organizations charged with facilitating the flow of information to rights holders should be encouraged.

114. States should effectively disseminate, in accessible formats and local languages, the outcomes of decisions made at international forums, including recommendations emanating from United Nations bodies and entities involved in monitoring the implementation of States' obligations under international human rights law.

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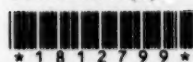
Human Rights Council**Thirty-ninth session**

Agenda items 2 and 3

**Annual report of the United Nations High Commissioner
for Human Rights and reports of the Office of the
High Commissioner and the Secretary-General****Promotion and protection of all human rights, civil,
political, economic, social and cultural rights,
including the right to development****The right to privacy in the digital age****Report of the United Nations High Commissioner for Human Rights***Summary*

The present report is submitted pursuant to resolution 34/7, in which the Human Rights Council requested the High Commissioner for Human Rights to prepare a report identifying and clarifying principles, standards and best practices regarding the promotion and protection of the right to privacy in the digital age, including the responsibility of business enterprises in this regard, and present it to the Human Rights Council at its thirty-ninth session.

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I. Introduction

1. The need to address the challenges that the digital world brings to the right to privacy is more acute than ever. Driven mostly by the private sector, digital technologies that continually exploit data linked to people's lives, are progressively penetrating the social, cultural, economic and political fabric of modern societies. Increasingly powerful data-intensive technologies, such as big data and artificial intelligence, threaten to create an intrusive digital environment in which both States and business enterprises are able to conduct surveillance, analyse, predict and even manipulate people's behaviour to an unprecedented degree. While there is no denying that data-driven technologies can be put to highly beneficial uses, these technological developments carry very significant risks for human dignity, autonomy and privacy and the exercise of human rights in general if not managed with great care.

2. International and regional actors are increasingly aware of the challenges and beginning to act accordingly. The Human Rights Council mandated a Special Rapporteur on the right to privacy in July 2015. In numerous resolutions, the Human Rights Council and the General Assembly have expressed concerns about the risks to privacy emanating from State surveillance measures and business practices.¹ At the regional level, several measures have strengthened data privacy protections, such as the European Union General Data Protection Regulation, which has recently taken effect with global implications; the Council of Europe protocol to update and modernize the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data and the African Union Commission Personal Data Protection Guidelines for Africa. At the same time, many Governments have adopted laws or proposed legislation that increases their surveillance powers, often in ways that fall short of applicable international human rights standards.²

3. The present report provides guidance on how to address some of the pressing challenges that the right to privacy faces in the digital age. It provides a brief overview of the international legal framework and includes a discussion of the most significant current trends. It then turns to the obligations of States and the responsibility of business enterprises, including a discussion of adequate safeguards and oversight. The final chapter gives some insights into how remedies can be provided for privacy infringements and abuses.

4. The report builds on the 2014 report by the High Commissioner on the right to privacy in the digital age (A/HRC/27/37) and on the presentations and discussions at an expert workshop that took place in Geneva in February 2018.³ It also relies on 63 written submissions received from a wide range of stakeholders.⁴

II. Understanding the right to privacy in the digital age

5. The right to privacy is a fundamental human right, recognized in article 12 of the Universal Declaration of Human Rights, article 17 of the International Covenant on Civil and Political Rights and in many other international and regional human rights

¹ See, for example, General Assembly resolutions 68/167, 69/166 and 71/199 and Human Rights Council resolutions 28/16 and 34/7 and decision 25/117.

² See, for example, Anja Seibert-Fohr, "Digital surveillance, metadata and foreign intelligence cooperation: unpacking the international right to privacy" (April 2018), available from <https://ssrn.com/abstract=3168711>; <https://csrcl.huji.ac.il/people/line-surveillance-case-law-un-human-rights-committee> and www.ohchr.org/Documents/Issues/DigitalAge/ReportPrivacyinDigitalAge/SR_right_privacy.pdf.

³ See www.ohchr.org/EN/Issues/DigitalAge/Pages/DigitalAgePrivacyWorkshop.aspx and webcast available at <http://webtv.un.org/search/part-1.1-un-expert-workshop-on-the-right-to-privacy-in-the-digital-age/5734527899001/?term=2018-02-19&sort=date&page=2>.

⁴ All submissions are available at www.ohchr.org/EN/Issues/DigitalAge/Pages/ReportDigitalAge.aspx.

instruments.^{5, 6} Privacy can be considered as the presumption that individuals should have an area of autonomous development, interaction and liberty, a "private sphere" with or without interaction with others, free from State intervention and from excessive unsolicited intervention by other uninvited individuals (see, for example, A/HRC/13/37, para. 11, and A/HRC/23/40, paras. 22 and 42). In the digital environment, informational privacy, covering information that exists or can be derived about a person and her or his life and the decisions based on that information, is of particular importance.

6. The protection of the right to privacy is broad, extending not only to the substantive information contained in communications but equally to metadata as, when analysed and aggregated, such data "may give an insight into an individual's behaviour, social relationship, private preference and identity that go beyond even that conveyed by accessing the content of a communication" (see A/HRC/27/37, para. 19). The protection of the right to privacy is not limited to private, secluded spaces, such as the home of a person, but extends to public spaces and information that is publicly available (see CCPR/C/COL/CO/7, para. 32). For example, the right to privacy comes into play when a Government is monitoring a public space, such as a marketplace or a train station, thereby observing individuals. Similarly, when information that is publicly available about an individual on social media is collected and analysed, it also implicates the right to privacy.⁷ The public sharing of information does not render its substance unprotected.⁸

7. The right to privacy is not only impacted by the examination or use of information about a person by a human or an algorithm.⁹ Even the mere generation and collection of data relating to a person's identity, family or life already affects the right to privacy, as through those steps an individual loses some control over information that could put his or her privacy at risk (see A/HRC/27/37, para. 20).¹⁰ In addition, the mere existence of secret surveillance amounts to an interference with the right to privacy (ibid).¹¹

8. The right to privacy applies equally to everyone. Any differences in its protection on the basis of nationality or any other grounds are inconsistent with the right to equality and non-discrimination contained in article 26 of the International Covenant on Civil and Political Rights.

9. A State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State party, even if not situated within its territory.¹² Human rights law applies where a State exercises its power or effective control in relation to digital communications infrastructure, wherever located, for example through direct tapping or penetration of communications infrastructure located outside the territory of that State. Equally, where a State exercises regulatory jurisdiction over a third party that controls a person's information (for example, a cloud service provider), that State also has to extend human rights protections to those whose privacy would be affected by accessing or using that information (see A/HRC/27/37, para. 34).

⁵ See, for example, article 16 of the Convention on the Rights of the Child; article 14 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; and article 22 of the Convention on the Rights of Persons with Disabilities.

⁶ See, for example, article 10 of the African Charter on the Rights and Welfare of the Child; article 11 of the American Convention on Human Rights; and article 8 of the European Convention on Human Rights.

⁷ See Privacy International submission for the present report.

⁸ Anja Seibert-Fohr, "Digital surveillance, metadata and foreign intelligence cooperation: unpacking the international right to privacy".

⁹ See Paul Bernal, "Data gathering, surveillance and human rights: recasting the debate", *Journal of Cyber Policy*, vol. 1, No. 2 (2016).

¹⁰ See also European Court of Human Rights, *Rotaru v. Romania*, application No. 28341/95, judgment of 4 May 2000 and *Kopp v. Switzerland*, application No. 23224/94, judgment of 25 March 1998.

¹¹ See also European Court of Human Rights, *Roman Zakharov v. Russia*, application No. 47143/06, judgment of 4 December 2015.

¹² See Human Rights Committee, general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, para. 10.

10. According to article 17 of the Covenant, any interference is only permissible if it is neither arbitrary nor unlawful. Human rights mechanisms have consistently interpreted those words as pointing to the overarching principles of legality, necessity and proportionality (see A/HRC/27/37, paras. 21–27).¹³ In keeping with those principles, States may only interfere with the right to privacy to the extent envisaged by the law and the relevant legislation must specify in detail the precise circumstances in which such interference may be permitted.¹⁴ Interference is unlawful and arbitrary not only when it is not provided for by law but also when a law or the particular interference is in conflict with the provisions, aims and objectives of the Covenant.¹⁵ A limitation can only be lawful and non-arbitrary if it serves a legitimate purpose (see A/HRC/29/32, para. 33). The limitation must be necessary for reaching that legitimate aim and in proportion to that aim and must be the least intrusive option available. Furthermore, any limitation to the right to privacy must not render the essence of the right meaningless (see A/69/397, para. 51).

11. The right to privacy is central to the enjoyment and exercise of human rights online and offline. It serves as one of the foundations of a democratic society and plays a key role for the realization of a broad spectrum of human rights, ranging from freedom of expression (see A/HRC/23/44 and A/HRC/29/32, para. 15) and freedom of association and assembly (see A/HRC/31/06, paras. 73–78 and A/72/135, paras. 47–50) to the prohibition of discrimination and more.¹⁶ Interference with the right to privacy can have a disproportionate impact on certain individuals and/or groups, thus exacerbating inequality and discrimination.¹⁷ Overbroad privacy regulations may also amount to undue limitations of other rights, in particular freedom of expression, for example when a disproportionate regulation interferes with legitimate news reporting, artistic expression or scientific research. For lack of space, the interrelationship between the right to privacy and all other human rights, its discriminatory impact on specific individuals and groups, and approaches to protect them cannot be examined in the present report.

III. Privacy interferences: trends and concerns

A. Increased reliance on personal data by Governments and business enterprises

Growing digital footprints

12. Both States and business enterprises collect and use steadily increasing amounts of data related to the private lives of individuals. Immense data streams relating to billions of individuals are being collected by personal computers, smartphones, smartwatches, fitness trackers and other wearables. A rapidly growing number of other interconnected devices and sensors installed in so-called smart homes and smart cities add further data. The range and depth of the information collected and used are vast, from device identifiers, email addresses and phone numbers to biometric, health and financial data and behavioural patterns. Much of this happens without the knowledge of the persons concerned and without meaningful consent.

Data sharing and fusion

13. Business enterprises and States continuously exchange and fuse personal data from various sources and databases, with data brokers assuming a key position. As a consequence, individuals find themselves in a position of powerlessness, as it seems almost

¹³ See also Human Rights Council resolution 34/7, para. 2.

¹⁴ See Human Rights Committee, general comment No. 16 (1988) on the right to privacy, paras. 3 and 8.

¹⁵ *Ibid.* para. 4.

¹⁶ See Paul Brivard, “Data gathering, surveillance and human rights: recasting the debate”.

¹⁷ See General Assembly resolution 71/199, para. 5 (g); Human Rights Council resolution 34/7, para. 5 (g); and International Network of Civil Liberties Organizations, submission for the present report.

impossible to keep track of who holds what kind of information about them, let alone to control the many ways in which that information can be used.

Biometric data

14. States and business enterprises increasingly deploy systems relying on the collection and use of biometric data, such as DNA, facial geometry, voice, retina or iris patterns and fingerprints. Some countries have created immense centralized databases storing such information for a diverse range of purposes, from national security and criminal investigation to the identification of individuals for purposes of the provision of essential services, such as social and financial services and education. State actors around the world deploy closed-circuit television cameras in cities, train stations or airports that use facial recognition to automatically identify and flag persons. Biometric-based technologies are increasingly used to control migration, both at borders and within countries. The creation of mass databases of biometric data raises significant human rights concerns. Such data is particularly sensitive, as it is by definition inseparably linked to a particular person and that person's life, and has the potential to be gravely abused. For example, identity theft on the basis of biometrics is extremely difficult to remedy and may seriously affect an individual's rights. Moreover, biometric data may be used for different purposes from those for which it was collected, including the unlawful tracking and monitoring of individuals. Given those risks, particular attention should be paid to questions of necessity and proportionality in the collection of biometric data. Against that background, it is worrisome that some States are embarking on vast biometric data-based projects without having adequate legal and procedural safeguards in place.

Growing analytical power

15. The analytical power of data-driven technology continues to grow exponentially. Big data analytics and artificial intelligence increasingly enable States and business enterprises to obtain fine-grained information about people's lives, make inferences about their physical and mental characteristics and create detailed personality profiles. Many systems used by Governments and business enterprises are built for that precise purpose — maximizing the amount of information on individuals in order to analyse, profile, assess, categorize and eventually make decisions, often automated, about them.

16. The resulting environment carries risks for individuals and societies that can hardly be overestimated. For example, recent years have seen data breaches of huge scope, exposing the persons concerned to identity theft and the disclosure of intimate information. Illegitimate data collection and analysis have been connected to the targeting of voters. Profiles, "scoring" and "ranking" of individuals can be used for assessing eligibility for health care, other insurance coverage, financial services and beyond. Opaque data-based decisions in high-stakes cases, for example in sentencing procedures and recidivism assessments, may threaten due process. Attempts to identify individuals as potential security threats in the context of predictive policing raise concerns, given the issues surrounding transparency, overbreadth, accountability and the potential for discriminatory outcomes.¹⁸

B. State surveillance and communications interception

Mass surveillance

17. Many States continue to engage in secret mass surveillance and communications interception, collecting, storing and analysing the data of all users relating to a broad range of means of communication (for example, emails, telephone and video calls, text messages and websites visited). While some States claim that such indiscriminate mass surveillance is necessary to protect national security, this practice is "not permissible under international human rights law, as an individualized necessity and proportionality analysis would not be

¹⁸ See Ajay Sandhu, "Data driven policing: highlighting some risks associated with predicting crime", Human Rights Centre, Essex University

possible in the context of such measures" (see A/HRC/33/29, para. 58).¹⁹ As the European Court of Human Rights has pointed out, "a system of secret surveillance set up to protect national security may undermine or even destroy democracy under the cloak of defending it".²⁰

Access to the user data of business enterprises

18. States often rely on business enterprises for the collection and interception of personal data. For example, some States compel telecommunications and Internet service providers to give them direct access to the data streams running through their networks. Such systems of direct access are of serious concern, as they are particularly prone to abuse and tend to circumvent key procedural safeguards.²¹ Some States also demand access to the massive amounts of information collected and stored by telecommunications and Internet service providers. States continue to impose mandatory obligations on telecommunications companies and Internet service providers to retain communications data for extended periods of time.²² Many such laws require the companies to collect and store indiscriminately all traffic data of all subscribers and users relating to all means of electronic communication. They limit people's ability to communicate anonymously, create the risk of abuses and may facilitate disclosure to third parties, including criminals, political opponents, or business competitors through hacking or other data breaches. Such laws exceed the limits of what can be considered necessary and proportionate.²³

Hacking

19. Governments appear to rely increasingly on offensive intrusion software that infiltrates individuals' digital devices. This type of hacking enables indiscriminate interception and collection of all kinds of communications and data, encrypted or not, and also permits remote and secret access to personal devices and data stored on them, enabling the conduct of real-time surveillance and manipulation of data on such devices.²⁴ That poses risks not only for the right to privacy but also for procedural fairness rights when such evidence may be used in legal proceedings (see A/HRC/23/40, para. 62). Hacking also raises significant extraterritoriality concerns, as it can affect individuals across many jurisdictions.²⁵ Furthermore, hacking relies on exploiting vulnerabilities in information and communications technology (ICT) systems and thus contributes to security threats for millions of users.

Attempts at weakening encryption and anonymity

20. Recurring attempts by States to weaken encryption technology and limit access to anonymity tools similarly threaten the security and confidentiality of communications and other activities online. Some States call for mandated back doors in encrypted communications, require providers of encrypted communications services to hand over encryption keys (see A/HRC/29/32, paras. 38–45) or even ban or block certain secure communications applications, including encrypted messaging and virtual private and anonymization networks. Encryption and anonymity provide individuals and groups with a zone of privacy online where they can hold opinions and exercise freedom of expression without arbitrary and unlawful interference or attacks (A/HRC/29/32).²⁶ Encryption and

¹⁹ See also A/HRC/27/37, para. 25.

²⁰ See *Roman Zakharov v. Russia*, para. 232.

²¹ See *Roman Zakharov v. Russia*, para. 270.

²² See CCPR/C/ZAF/CO/1, paras. 42–43, and CCPR/C/PAK/CO/1, paras. 35–36.

²³ See, for example, European Court of Justice joined cases C-203/15 and C-698/15, *Tele2 Sverige AB v. Swedish Post and Telecom Authority and Secretary of State for the Home Department v. Watson*, judgment of 21 December 2016, para. 107; CCPR/C/ZAF/CO/1, paras. 42–43; and CCPR/C/CMR/CO/5, paras. 39–40.

²⁴ See Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, "Encryption and anonymity follow-up report" (June 2018).

²⁵ See submission of Privacy International.

²⁶ See also UCI Law International Justice Clinic, "Selected references: unofficial companion to report of the Special Rapporteur (A/HRC/29/32) on encryption, anonymity and the freedom of expression";

anonymity tools are widely used around the world, including by human rights defenders, civil society, journalists, whistle-blowers and political dissidents facing persecution and harassment. Weakening them jeopardizes the privacy of all users and exposes them to unlawful interferences not only by States, but also by non-State actors, including criminal networks.²⁷ Such a widespread and indiscriminate impact is not compatible with the principle of proportionality (see A/HRC/29/32, para. 36).

Intelligence-sharing

21. Governments across the globe routinely share intelligence on individuals outside any legal framework and without adequate oversight.²⁸ Intelligence-sharing poses the serious risk that a State may use this approach to circumvent domestic legal constraints by relying on others to obtain and then share information. Such a practice would fail the test of lawfulness and may undermine the essence of the right to privacy (see A/HRC/27/37, para. 30). The threat to human rights protections is particularly acute where intelligence is shared with States with weak rule of law and/or a history of systematically violating human rights. Intelligence received by one State from another may have been obtained in violation of international law, including through torture and other cruel, inhuman or degrading treatment. The human rights risks posed by intelligence-sharing are heightened by the current lack of transparency, accountability and oversight of intelligence-sharing arrangements (see A/69/397, para. 44, CCPR/C/GBR/CO/7, para. 24, and CCPR/C/SWE/CO/7, para. 36). With very few exceptions, legislation has failed to place intelligence-sharing on a proper statutory footing, compliant with the principle of legality under international human rights law.²⁹

Cross-border access to data held by business enterprises

22. Recently, there have been efforts to create legal mechanisms aimed at facilitating the access of States to personal information stored on the servers of business enterprises abroad. Obtaining evidence in the course of a criminal investigation is without doubt an important and legitimate goal. However, such access can result in weakening or circumventing procedural safeguards, such as the requirement for authorization by an independent body and the establishment of adequate oversight mechanisms. Cross-border requests may also negatively impact individuals' access to appeals and remedial mechanisms. Particularly concerning is the possibility that States with weak rule of law and/or problematic human rights records could obtain access to sensitive information about individuals without adequate protections against human rights abuses.

IV. Responsibilities of States

A. State responsibility to respect and duty to protect the right to privacy in the digital age

23. Article 2 (1) of the International Covenant on Civil and Political Rights requires States to "respect and ensure" the rights recognized in the Covenant for all individuals within their territory and subject to their jurisdiction, without discrimination. States parties must refrain from violating the rights recognized in the Covenant, and any restrictions on any of those rights must be permissible under the relevant provisions of the Covenant.³⁰

Amnesty International, "Encryption. A matter of human rights" (March 2016); and Wolfgang Schulz and Joris van Hoboken, "Human rights and encryption", United Nations Educational, Scientific and Cultural Organization (2016).

²⁷ See www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17138.

²⁸ See Privacy International, *Secret Global Surveillance Networks: Intelligence Sharing between Governments and the Need for Safeguards* (April 2018) and www.ohchr.org/Documents/Issues/DigitalAge/ReportPrivacyinDigitalAge/SRCT.pdf.

²⁹ See submission of Privacy International.

³⁰ See Human Rights Committee, general comment No. 31, para. 6.

However, the obligations of States extend beyond the obligation to respect and also include "positive" measures to protect the enjoyment of rights. In the context of the right to privacy, that implies a duty to adopt legislative and other measures to give effect to the prohibition of and protection against unlawful or arbitrary interference and attacks, whether they emanate from State authorities or from natural or legal persons.³¹

24. The duty to protect is reflected in pillar I of the Guiding Principles on Business and Human Rights, entitled the "State duty to protect human rights", which elaborates on the implications of the duty of States to protect against adverse human rights impacts involving companies. Principle 1 of the Guiding Principles requires that appropriate steps be taken to prevent, investigate, punish and redress human rights abuses through effective policies, legislation, regulations and adjudication. The subsequent principles outline the different legal and policy areas in which States should adopt a "smart mix of measures" — national and international, mandatory and voluntary — to foster business respect for human rights.³² Examples of the application of the approach stipulated in the Guiding Principles in relation to the ICT sector include sectoral guidance developed at the European Union level, which focuses on how ICT enterprises should deal with any detrimental impact of their activities.

25. The duty of States to protect against abuses of the right to privacy by companies and other third parties incorporated or domiciled within their jurisdiction has extraterritorial effects. For example, States should have in place export control regimes applicable to surveillance technology, which provide for assessing the legal framework governing the use of the technology in the destination country, the human rights record of the proposed end user and the safeguards and oversight procedures in place for the use of surveillance powers. Human rights guarantees need to be included in export licensing agreements. Furthermore, States have a duty to protect persons within their jurisdictions from extraterritorial interference with their rights to privacy, such as means of interception of communications or hacking.

B. State responsibility to put in place adequate safeguards and effective oversight

26. Enjoyment of the right to privacy depends largely on a legal, regulatory and institutional framework that provides for adequate safeguards, including effective oversight mechanisms. In an era where a vast amount of personal data is accessible to States and business enterprises, and individuals have limited insight into and control over how information about them and their lives is being used, it is critical to focus on measures that mitigate the impact on human rights from such power and information asymmetries.

1. Overarching framework protecting against undue interference

27. One cornerstone of a State privacy protection framework should be laws setting the standards for the processing of personal information by both States and private actors.³³ While States have discretion in defining the smart mix of measures governing the corporate use of personal information, article 17 (2) of the International Covenant on Civil and Political Rights lays down the need to protect individuals by means of law. The increased interlinking of public and private data processing and the track record to date implying mass, recurrent misuse of personal information by some business enterprises confirm that legislative measures are necessary for achieving an adequate level of privacy protection.³⁴

³¹ See Human Rights Committee, general comments No. 16, paras. 1 and 9, and No. 31, para. 8.

³² See Principle 2, commentary.

³³ See Human Rights Committee, general comment No. 16, para. 9; A/HRC/13/37, para. 61, and A/HRC/17/27, para. 56. For a global overview of data privacy legislation, see Graham Greenleaf, University of New South Wales, submission for the present report. In the present report "processing" is understood as encompassing any operation performed on personal data, including collection, retention, use, modification, erasure, disclosure, transfer and combination.

³⁴ See Human Rights Council resolutions 34/7, para. 5 (f), and 38/7, para. 17.

28. There is a growing global consensus on minimum standards that should govern the processing of personal data by States, business enterprises and other private actors. International instruments and guidelines reflecting this development include the 1990 Guidelines for the Regulation of Computerized Personal Data Files; the Council of Europe 1981 Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data and its modernized version, which sets a global high level of protection;³⁵ the 1980 Organization for Economic Cooperation and Development Privacy Guidelines, updated in 2013; the 2014 African Union Convention on Cyber Security and Personal Data Protection (Malabo Convention); the Madrid resolution of the International Conference of Data Protection and Privacy Commissioners; and the 2015 Asia-Pacific Economic Coordination Privacy Framework, among others. Those standards, particularly the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, have informed the data privacy frameworks of many States and can direct the design of adequate policy instruments.³⁶

29. The instruments and guidelines mentioned above contain a range of key principles, rights and obligations that ensure a minimum level of protection of personal data. First, processing of personal data should be fair, lawful and transparent. The individuals whose personal data are being processed should be informed about the data processing, its circumstances, character and scope, including through transparent data privacy policies. In order to prevent the arbitrary use of personal information, the processing of personal data should be based on the free, specific, informed and unambiguous consent of the individuals concerned, or another legitimate basis laid down in law.³⁷ Personal data processing should be necessary and proportionate to a legitimate purpose that should be specified by the processing entity. Consequently, the amount and type of data and the retention period need to be limited, data must be accurate and anonymization and pseudonymization techniques used whenever possible. Changes of purpose without the consent of the person concerned should be avoided and when undertaken, should be limited to purposes compatible with the initially specified purpose. Considering the vulnerability of personal data to unauthorized disclosure, modification or deletion, it is essential that adequate security measures be taken. Moreover, entities processing personal data should be accountable for their compliance with the applicable data processing legal and policy framework. Finally, sensitive data should enjoy a particularly high level of protection.³⁸

30. In all the instruments and guidelines mentioned above, it is recognized that certain rights need to be afforded to the persons whose data is being processed. At a minimum, the persons affected have a right to know that personal data has been retained and processed, to have access to the data stored, to rectify data that is inaccurate or outdated and to delete or rectify data unlawfully or unnecessarily stored. Newer instruments have added important additional rights, in particular, a right to object to personal data processing, at least for cases where the processing entity does not demonstrate legitimate, overriding grounds for the processing.³⁹ States should pay particular attention to providing strong protection against interference with the right to privacy by means of profiling and automated decision-making. The rights described above should also apply to information derived, inferred and predicted by automated means, to the extent that the information qualifies as personal data. It is important that the legal framework ensures that those rights do not unduly limit the

³⁵ In addition to the 47 member States of the Council of Europe, the Convention has been ratified by Mauritius, Senegal, Tunisia and Uruguay, and several other States are in the process of accession.

³⁶ For detailed guidance, see <https://privacyinternational.org/advocacy-briefing/2165/guide-policy-engagement-data-protection> and Access Now, "Creating a data protection framework: a do's and don'ts guide for lawmakers. Lessons from the EU general data protection regulation" (2018).

³⁷ See article 5 (2) of the modernized Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data; article 13 (1) of the Malabo Convention; and principle 12 of the Madrid resolution.

³⁸ See article 6 of the modernized Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.

³⁹ *Ibid.*, art. 9 (1) (d). See also article 21 of the general data protection regulation and article 18 (1) of the Malabo Convention.

right to freedom of expression, including processing of personal data for journalistic, artistic and academic purposes.

31. Data privacy frameworks should also establish certain obligations of the entities processing personal data. Those requirements encompass organizational aspects, such as the establishment of an internal supervisory mechanism, but also include mandatory actions, such as data breach notifications and privacy impact assessments. In an increasingly complex technological environment, such assessments assume a key role in preventing and mitigating privacy harms.⁴⁰ Moreover, requirements related to the design of products and services, such as privacy by design⁴¹ and privacy by default,⁴² are essential tools for safeguarding the right to privacy.

32. In a globalized world, transfers of data, including large amounts of personal data are commonplace and necessary for the operation of many services. States must ensure that such transfers do not amount to or facilitate undue interference with the right to privacy. At the same time, strict data localization requirements that oblige all data processing entities to store all personal data within the country at issue should be avoided (see A/HRC/32/38, para. 61). Instead, States should focus on ways to ensure that personal data transferred to another State is protected at least at the level required by international human rights law.

33. States should establish independent oversight bodies for the processing of personal data. Such bodies are essential for safeguarding the human rights of the individual against excessive practices of personal data processing. A supervisory authority requires a statutory footing in order to establish clearly its mandate, powers and independence. Such oversight bodies should be provided with the technical, financial and human resources necessary for effective monitoring of the data-processing activities of States and business enterprises, and for enforcing legal requirements in that regard. Moreover, such bodies need to have sufficient legal authority to carry out their functions, including imposing sanctions proportionate to the violations or abuses committed.⁴³

2. Procedural safeguards and oversight for surveillance and communications interception

Safeguards

34. While all types of State surveillance-related activities must be conducted on the basis of a law (see A/HRC/27/37, para. 28), the Special Rapporteur on the right to privacy has called attention to the widespread absence of such legislation. It is noteworthy that in many jurisdictions, intelligence and law enforcement agencies are excluded from the provisions of data privacy legislation. Such exceptions should be limited, based on the principles of necessity and proportionality, in order to ensure an adequate level of data privacy in all branches of government. Surveillance-specific legislation should be guided by the following minimum standards.

35. The law must be publicly accessible. Secret rules and secret interpretations of law do not have the necessary qualities of "law" (ibid., para. 29). Laws need to be sufficiently precise. Discretion granted to the executive or a judge and how such discretion may be exercised must be circumscribed with reasonable clarity (see A/69/397, para. 35).⁴⁴ To that end, the nature of the offence and the category of persons that may be subjected to surveillance must be described. Vague and overbroad justifications, such as unspecific references to "national security" do not qualify as adequately clear laws. Surveillance must be based on reasonable suspicion and any decision authorizing such surveillance must be

⁴⁰ For an in-depth analysis of approaches to privacy impact assessments, see David Wright and Paul de Hert, eds., *Privacy Impact Assessment* (New York, Springer, 2012).

⁴¹ Meaning that privacy protection must be integrated from the outset when designing a system.

⁴² Requiring that a system applies privacy-respecting settings by default.

⁴³ See, for example, <https://ico.org.uk/action-weve-taken/investigation-into-data-analytics-for-political-purposes/>.

⁴⁴ See also *Roman Zakharov v. Russia*, para. 230.

sufficiently targeted.⁴⁵ The law must strictly assign the competences to conduct surveillance and access the product of surveillance to specified authorities.

36. In terms of its scope, the legal framework for surveillance should cover State requests to business enterprises. It should also cover access to information held extraterritorially or information-sharing with other States. A structure to ensure accountability and transparency within governmental organizations carrying out surveillance needs to be clearly established in the law.

37. Powers of secret surveillance can only be justified as far as they are strictly necessary for achieving a legitimate aim and meet the proportionality requirement (see A/HRC/23/40, para. 83 (b)).⁴⁶ Secret surveillance measures must be limited to preventing or investigating the most serious crimes or threats. The duration of the surveillance should be limited to the strict minimum necessary for achieving the specified goal. There must be rigorous rules for using and storing the data obtained and the circumstances in which the data collected and stored must be erased need to be clearly defined, based on strict necessity and proportionality.⁴⁷ Intelligence-sharing must be subject to the same principles of legality, strict necessity and proportionality.

38. Where Governments consider targeted hacking measures, they should take an extremely cautious approach, resorting to such measures only in exceptional circumstances for the investigation or prevention of the most serious crimes or threats and with the involvement of the judiciary (see CCPR/C/ITA/CO/6, para. 37).⁴⁸ Hacking operations should be narrowly designed, limiting access to information to specific targets and types of information. States should refrain from compelling private entities to assist in hacking operations, thereby impacting the security of their own products and services. Compelled decryption may only be permissible on a targeted, case-by-case basis and subject to judicial warrant and the protection of due process rights (see A/HRC/29/32, para. 60).

Independent authorization and oversight⁴⁹

39. Surveillance measures, including communications data requests to business enterprises and intelligence-sharing, should be authorized, reviewed and supervised by independent bodies at all stages, including when they are first ordered, while they are being carried out and after they have been terminated (see CCPR/C/FRA/CO/5, para. 5).⁵⁰ The independent body authorizing particular surveillance measures, preferably a judicial authority, needs to make sure that there is clear evidence of a sufficient threat and that the surveillance proposed is targeted, strictly necessary and proportionate and authorize (or reject) ex ante the surveillance measures.

40. Oversight frameworks may integrate a combination of administrative, judicial and/or parliamentary oversight.⁵¹ Oversight bodies should be independent of the authorities carrying out the surveillance and equipped with appropriate and adequate expertise, competencies and resources. Authorization and oversight should be institutionally separated. Independent oversight bodies should proactively investigate and monitor the activities of those who conduct surveillance and have access to the products of surveillance, and carry out periodic reviews of surveillance capabilities and technological developments. The agencies carrying out surveillance should be required to provide all the information necessary for effective oversight upon request and regularly report to the oversight bodies.

⁴⁵ Ibid., paras. 248 and 260.

⁴⁶ See also *Szabo and Vissy v. Hungary*, para. 73.

⁴⁷ See *Roman Zakharov v. Russia*, para. 231.

⁴⁸ See also Access Now, "A human rights response to government hacking" (September 2016) and Privacy International, "Government hacking and surveillance: 10 necessary safeguards".

⁴⁹ See A/HRC/34/60 and European Agency for Fundamental Rights, *Surveillance by Intelligence Services: Fundamental Rights Safeguards and Remedies in the EU. Volume II: Field Perspectives and Legal Update*, (Luxembourg, Publications Office of the European Union, 2017).

⁵⁰ See also *Roman Zakharov v. Russia*, para. 233.

⁵¹ See General Assembly resolution 71/199, para. 5 (d).

and they should be required to keep records of all surveillance measures taken.⁵² Oversight processes must also be transparent and subject to appropriate public scrutiny and the decisions of the oversight bodies must be subject to appeal or independent review. Exposing oversight bodies to divergent points of view, for example through expert and multi-stakeholder consultations (see for example A/HRC/34/60, para. 36), is particularly important in the absence of an adversarial process: it is essential that “points of friction” — continual challenges to approaches and understandings — be built in.⁵³

Principle of transparency

41. State authorities and oversight bodies should also engage in public information about the existing laws, policies and practices in surveillance and communications interception and other forms of processing of personal data, open debate and scrutiny being essential to understanding the advantages and limitations of surveillance techniques (see A/HRC/13/37, para. 55). Those who have been the subject of surveillance should be notified and have explained to them ex post facto the interference with their right to privacy. They also should be entitled to alter and/or delete irrelevant personal information, provided that information is not needed any longer to carry out any current or pending investigation (see A/HRC/34/60, para. 38).

V. Responsibilities of business enterprises

42. Pillar II of the Guiding Principles on Business and Human Rights provides an authoritative blueprint for all enterprises, regardless of their size, sector, operational context, ownership and structure, for preventing and addressing all adverse human rights impacts, including the right to privacy.⁵⁴ It outlines the responsibility of business enterprises to respect all internationally recognized human rights, meaning that they should avoid infringing on the human rights of others and address adverse human rights impacts with which they are involved.⁵⁵ The responsibility to respect applies throughout a company’s activities and business relationships. It is of particular relevance in the digital space that the responsibility to respect applies, regardless of where the people affected are located. The responsibility to respect exists independently of whether the State meets its own human rights obligations.

43. Meeting the responsibility to respect human rights requires that business enterprises (a) avoid causing adverse impacts through their own activities; (b) avoid contributing to adverse impacts through their own activities, either directly or through some outside entity (Government, business or others); and (c) seek to prevent or mitigate adverse human rights impacts directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.⁵⁶ For example, a company that provides data about users to a Government that then uses the data to trace and prosecute political dissidents will have contributed to such human rights abuses, including of the right to privacy. Companies that manufacture and sell technologies used for unlawful or arbitrary intrusions will also be contributing to adverse human rights impacts.

44. If there are conflicting demands between respect for international human rights law and obligations under national law, companies should strive to respect international human

⁵² See European Court of Human Rights, *Kennedy v. United Kingdom*, application No. 26839/05, judgment of 18 May 2010, para. 165, and *Roman Zakharov v. Russia*, para. 272.

⁵³ See Human Rights, Big Data and Technology Project, Human Rights Centre, University of Essex, submission for the present report.

⁵⁴ The Guiding Principles were unanimously endorsed by the Human Rights Council in its resolution 17/4.

⁵⁵ Guiding Principle 11.

⁵⁶ Guiding Principle 13. See also OHCHR, “The corporate responsibility to respect human rights: an interpretive guide” (2012).

rights law to the greatest extent possible and mitigate as much as possible any adverse impact, for example by interpreting government demands as narrowly as possible.⁵⁷

45. The responsibility to respect human rights requires business enterprises to have in place policies and processes appropriate to their size and circumstances, including:

(a) Making a publicly available policy commitment at the most senior level and embedding responsibility to respect human rights throughout operational policies and procedures;⁵⁸

(b) Carrying out human rights due diligence processes, which entails:

(i) Conducting human rights impact assessments to identify and assess any actual or potentially adverse human rights impacts;

(ii) Integrating those assessments and taking appropriate action to prevent and mitigate adverse human rights impacts that have been identified;

(iii) Tracking the effectiveness of their efforts;

(iv) Reporting formally on how they have addressed their human rights impacts;⁵⁹

(c) Providing remediation or cooperating in remediation of abuse where the company identifies adverse impacts that it has caused or to which it has contributed.⁶⁰

46. According to the Guiding Principles, all companies have a responsibility to undertake human rights due diligence to identify and address any human rights impacts of their activities. Taking a concrete example, companies selling surveillance technology should carry out, as part of their due diligence, a thorough human rights impact assessment prior to any potential transaction. Risk mitigation should include clear end-use assurances being stipulated in contractual agreements with strong human rights safeguards that prevent arbitrary or unlawful use of the technology and periodic reviews of the use of technology by States.⁶¹ Companies collecting and retaining user data need to assess the privacy risks connected to potential State requests for such data, including the legal and institutional environment of the States concerned. They must provide for adequate processes and safeguards to prevent and mitigate potential privacy and other human rights harms. Human rights impact assessments also need to be conducted, as part of the adoption of the terms of service and design and engineering choices that have implications for security and privacy, and decisions taken to provide or terminate services in a particular context (see A/HRC/32/38, para. 11).

47. As part of the human rights due diligence process, the Guiding Principles stipulate that business enterprises should account for how they address their human rights impacts and be prepared to communicate that externally, particularly when concerns are raised by or on behalf of affected stakeholders.⁶² In the digital environment, that entails disclosing which personal data are collected, how long they are stored for, for what purpose, how they are used and with whom and under what circumstances they are shared. That includes requests received by States for access to user data. In instances where national laws and regulations hinder such reporting, companies should use to the greatest extent possible any leverage they may have and are encouraged to advocate for the possibility to release such information.

48. As part of the operationalization of their policy commitments under the Guiding Principles, the ICT sector has developed guidance on how to implement human rights policies. Such initiatives include the Principles on Freedom of Expression and Privacy of

⁵⁷ Guiding Principle 23.

⁵⁸ Guiding Principle 16.

⁵⁹ Guiding Principles 17–21.

⁶⁰ Guiding Principle 22 and section VI of the present report.

⁶¹ See Privacy International, submission to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (January 2016), available at www.ohchr.org/Documents/Issues/Expression/PrivateSector/PrivacyInternational.pdf.

⁶² Guiding Principle 21.

the Global Network Initiative (the GNI Principles)⁶³ and the Telecommunications Industry Dialogue Guiding Principles.⁶⁴ For example, the GNI principles specifically state that participating companies “will employ protections with respect to personal information” and “will respect and work to protect the privacy rights of users when confronted with government demands, laws or regulations that compromise privacy in a manner inconsistent with internationally recognized laws and standards”.

49. The Ranking Digital Rights Corporate Accountability Index evaluates a number of Internet, mobile and telecommunications companies specifically on their disclosed commitments and policies affecting freedom of expression and privacy.⁶⁵ That can be a useful tool for holding companies accountable for their impact on users’ rights.

VI. Remedies

50. Victims of privacy violations or abuses committed by States and/or business enterprises must have access to an effective remedy. States not only have obligations to ensure accountability and remedy for human rights violations committed by State actors, they must also take appropriate steps to ensure that victims of business-related human rights abuse have access to an effective remedy (see pillar III of the Guiding Principles on Business and Human Rights). Depending on the nature of a particular case or situation, victims should be able to achieve remedies through effective judicial or non-judicial State-based grievance mechanisms (A/HRC/32/19, Corr. 1 and Add. 1 and A/HRC/38/20 and Add. 1). Relevant State-based non-judicial mechanisms in the ICT context include independent authorities with powers to monitor State and private sector data privacy practices, such as privacy and data protection bodies.

51. Under the Guiding Principles, where business enterprises determine that they have caused or contributed to adverse human rights impacts, they should provide for or cooperate in the remediation of any adverse human rights impacts that they may have caused or contributed to through legitimate processes.⁶⁶ For any non-judicial mechanism to be effective, it should be legitimate, accessible, predictable, equitable, rights-compatible, transparent, a source of continuous learning and, for operational level grievance mechanisms, based on dialogue and engagement.⁶⁷

52. Where an enterprise has not caused or contributed to an adverse impact, but where the impact is directly linked to its operations, products or services by a business relationship, the appropriate action is elaborated in Guiding Principle 19. It may include using any leverage the enterprise may have over its business partner or client to seek to influence it to provide for remediation.⁶⁸

53. The Guiding Principles also highlight the role that operational-level grievance mechanisms can have in addressing grievances directly. Such mechanisms can potentially take a range of forms, which will depend on the type of company concerned, the needs of its stakeholders and the company’s human rights risk picture. To identify how those mechanisms may be designed and work in the ICT sector in practice, further discussion within the sector and with stakeholders is necessary.

54. In practice, there are significant gaps and obstacles when it comes to providing access to remedial avenues for privacy infringements. The transnational nature and effects of surveillance, communications interceptions and the many forms of processing of personal data pose legal and practical challenges (see A/HRC/34/60, para. 34). In addition,

⁶³ Available from <https://globalnetworkinitiative.org/gni-principles/>. See also the Global Network Initiative, submission for the present report.

⁶⁴ Available from www.telecomindustrydialogue.org/about/guiding-principles/.

⁶⁵ See <https://rankingdigitalrights.org/index2018/>.

⁶⁶ Guiding Principle 22.

⁶⁷ Guiding Principle 31.

⁶⁸ Guiding Principle 19 and its commentary. See also OHCHR, “The corporate responsibility to respect human rights: an interpretive guide”, pp. 48–52.

victims' lack of knowledge or proof of undue interference is a frequent obstacle to access to remedies (see A/HRC/27/37, para. 40). For example, State requests to access data held by companies are often accompanied by "gag orders" prohibiting companies from notifying the individuals concerned. States also often fail to notify those affected by other surveillance measures, in particular in mass surveillance cases. Recognizing that advance or concurrent notification might jeopardize the effectiveness of legitimate surveillance measures, individuals should nevertheless be notified once surveillance has been completed (see A/HRC/23/40, para. 82). If that is not possible, the law should generously grant standing to those who may theoretically have been affected by those measures (see A/HRC/13/37, para. 38). Similarly, business enterprises should notify their customers once they become aware of personal data breaches that may have affected their rights.

55. Victims also face new and growing challenges in the context of algorithmic decision-making, where individuals may not be able to access the input data or challenge the findings reached by the algorithm itself or how such findings were used in the decision reached.⁶⁹ States and business enterprises, in collaboration with other stakeholders, should consider possible mechanisms for addressing this issue, such as the creation of well-resourced expert auditing bodies.

56. The nature of the harm caused by privacy infringements is the source of further challenges. The effect of privacy breaches is difficult to undo and may result in ongoing consequences and further human rights implications. The ease of retaining, sharing, repurposing and fusing data and profiles influences the permanence of digital data, meaning an individual may face new and ongoing risks to their rights into the future.⁷⁰

57. Privacy harms significantly affect a person's life, even when there is no quantifiable economic or other impact; the nature of the harm should not prevent victims from seeking redress. For instance, consumer protection organizations could be empowered to seek redress on behalf of victims of corporate privacy abuses.

VII. Conclusions and recommendations

58. The international human right framework provides a strong basis for shaping the responses to the manifold challenges arising in the digital age. There is an urgent need for States to fully implement their obligations to respect the right to privacy, as well as their duty to protect the right to privacy, including vis-à-vis corporate abuses. To accomplish that objective, States need to establish an appropriate legal and policy framework, including adequate privacy protection legislation and regulation that incorporate the principles of legality, proportionality and necessity, and establish safeguards, oversight and remedies.

59. Many issues that could not be addressed in the present report require further in-depth study, including the interrelationships of the right to privacy with other human rights, including economic, social and cultural rights; disproportionate or discriminatory impacts of privacy invasions on individuals and/or groups at risk; the effects of big data and machine learning, including for predictive and pre-emptive purposes, on the enjoyment of the right to privacy and other human rights; and the regulation of surveillance technology markets.

60. The nature and forms of remedies that respond effectively to situations where the right to privacy has been violated is another area in which further attention is warranted. As a first step, the types of remedial action that would be appropriate in different situations should be identified in a systematic way. That could be used in the development of further guidance. In undertaking that analysis, due regard should be paid to the guidance and recommendations developed through the accountability and remedy project of the Office of the United Nations High Commissioner for Human

⁶⁹ See submission of the University of Essex Human Rights, Big Data and Technology Project, para. 33.

⁷⁰ Ibid, para. 7.

Rights (OHCHR). More generally, efforts should be made to develop sector-specific guidance tools on business responsibilities to respect the right to privacy.

61. The High Commissioner recommends that States:

- (a) Recognize the full implications of new technologies, in particular data-driven technologies for the right to privacy but also for all other human rights;
- (b) Adopt strong, robust and comprehensive privacy legislation, including on data privacy, that complies with international human rights law in terms of safeguards, oversight and remedies to effectively protect the right to privacy;
- (c) Ensure that data-intensive systems, including those involving the collection and retention of biometric data, are only deployed when States can demonstrate that they are necessary and proportionate to achieve a legitimate aim;
- (d) Establish independent authorities with powers to monitor State and private sector data privacy practices, investigate abuses, receive complaints from individuals and organizations, and issue fines and other effective penalties for the unlawful processing of personal data by private and public bodies;
- (e) Ensure, through appropriate legislation and other means that any interference with the right to privacy, including by communications surveillance and intelligence-sharing, complies with international human rights law, including the principles of legality, legitimate aim, necessity and proportionality, regardless of the nationality or location of the individuals affected, and clarify that authorization of surveillance measures requires reasonable suspicion that a particular individual has committed or is committing a criminal offence or is engaged in acts amounting to a specific threat to national security;
- (f) Strengthen mechanisms for the independent authorization and oversight of State surveillance and ensure that those mechanisms are competent and adequately resourced to monitor and enforce the legality, necessity and proportionality of surveillance measures;
- (g) Review laws to ensure that they do not impose requirements of blanket, indiscriminate retention of communications data on telecommunications and other companies;
- (h) Take steps in order to enhance transparency and accountability in the acquisition of surveillance technologies by States;
- (i) Fully implement their duty to protect against abuses of the right to privacy by business enterprises in all relevant sectors, including the ICT sector, by taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication;
- (j) Ensure that all victims of violations and abuses of the right to privacy have access to effective remedies, including in cross-border cases.

62. The High Commissioner recommends that business enterprises:

- (a) Make all efforts to meet their responsibility to respect the right to privacy and all other human rights. At a minimum, business enterprises should fully operationalize the Guiding Principles on Business and Human Rights, which implies conducting effective human rights due diligence across their operations and in relation to all human rights, including the right to privacy, and taking appropriate action to prevent, mitigate and address actual and potential impacts;
- (b) Seek to ensure a high level of security and confidentiality of any communications they transmit and personal data they collect, store or otherwise process. Conduct assessments on how best to design and update the security of products and services on an ongoing basis;
- (c) Comply with the key privacy principles referred to in paragraphs 29–31 of the present report and ensure the greatest possible transparency in their internal policies and practices that implicate the right to privacy of their users and customers;

(d) Provide for or cooperate in remediation through legitimate processes where they have caused or contributed to adverse impacts, including through effective operational-level grievance mechanisms;

(e) Contribute to the work of the OHCHR accountability and remedy project on developing guidance and recommendations to enhance the effectiveness of non-State-based grievance mechanisms in relation to abuses of the right to privacy in the digital space.
